87-1318

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

Civil Action Number ____

THE UNITED STATES SUPREME COURT

Term: October 1987

IN RE: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER THE PROPRIETORSHIP

ON WRIT OF MANDAMUS AND PROHIBITION
IN THE ALTERNATIVE TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT ISSUE

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Pro se

STATEMENT OF QUESTION PRESENTED FOR REVIEW

(1) Were the Appeals Court Judges Wald, Mikva and Edwards illegally and inappropriately negatively influenced (as was the District Court) by the fact that the Petitioner was (1) a lone plaintiff/appellant pitted against "Wall Street's finest" (2) a Black American of African ancestry, and (3) an unknown or non-member of the right economic class, in contravention of law and simple justice and thereby lead to affirm the dismissal of petitioner's legal claims on totally improper grounds?

(2) Did Appeals Court Judges Wald, Mikva and Edwards err in affirming the dismissal of petitioner's action by basing their affirmance upon an incomplete review of the evidence and affidavits that made up the undisputed record of the civil action or did they deliberately cast a blind eye to objective evidence (favorable to the petitioner) in order to justify preconceived willful and inappropriate conclusions at law.

(3) Did Appeals Court Judges Mikva, Edwards and Chief Judge Wald err by failing to apply black-letter law (that action may not be dismissed unless the complaint fails to allege sufficient information to demonstrate entitlement to relief, District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 243 U.S. App. D.C. 1 (D.C. Cir. 1984)) at the expense of petitioner's equal protection and due process of law rights under the U.S. Constitution.

(4) Did the petitioner in his complaint filed with the district court (at paragraphs 8, 86, 120-122, 125, 128-129, 134, 135, 73-78, 83, 94, 106, etc.) allege sufficient information which would entitle him to relief from Appeals Court Judges Wald, Mikva and Edwards, and was their finding that he did not a violent, erroneous and illegal injustice to the fundamental tenet (12(b)(6)) of federal procedure.

(5) Did Appeals Court Judges Wald, Mikva and Edwards err when they ruled October

9, 1987 that Petitioner failed to allege that he ever made a tender offer in his complaint (in view of the fact that petitioner set out under the heading, "The Tender Offer" his offer in full detail in his complaint at paragraphs 73-78? Based upon the undisputed facts of the case and the cases cited by Judges Wald, Mikva and Edwards in their October 9, 1987 Order and Memorandum (Voisin v. Bartell, Lewis v. McGraw and Piper v. Chris-Craft) (and those cited by petitioner), was there any factual or precedent basis whatsoever for them to find that petitioner did not submit a valid tender offer?

(6) Did Appeals Court Judges Wald, Mikva and Edwards act arbitrarily and willfully against petitioner when in the same October 9, 1987 Order and Memorandum as they recognized that petitioner "Cooper also alleges that General Electric Company ("GE") and RCA Corporation ("RCA") conspired with Dow Jones to refuse to sell advertising space to him and thereby restrain trade in RCA

stock," they also held (as a basis for affirming the district court's dismissal of his action), that petitioner's claim "does not constitute a violation of Section 1 of the Sherman Act [because] (officers or employees of the same firm do not provide the plurality of actors imperative for a Section 1 conspiracy)?"

(7) Did Judges Wald, Mikva and Edwards' classification and recognition of the GE offer as a "tender offer" in their order of October 9, 1987, recognize a basis for the application of the Williams Act (Section 14(e) disclosure provisions) to the solicitation of RCA shareholders by GE and RCA managements, in connection with that "GE tender offer."

(8) Did Appeals Court Judges Wald, Mikva and Edwards err when they found that petitioner Cooper's "damage claims ($78,250,000 immediate and $15,750,000,000 over a 50 year period (see complaint at paragraphs 134-135)) are frivolous in light

of ...[based upon]... the fact that Dow Jones' refusal to publish ... did not prevent him from otherwise purchasing RCA stock," when in fact the record clearly showed (at complaint paras. 74, 75 and 77(c) and (d)) that petitioner's offer required the full support of a controlling interest of RCA shareholders before Cooper's plans to buy even one RCA share could be implemented.

(9) Did Cooper's complaint (in which at paragraphs 8, 86, 94, 120, 122, 125-129, 134-135, etc., he alleged that he suffered injury as a result of conspiracy to his ability to trade and conduct his business) sufficiently allege that he incurred injury cognizable under the antitrust laws? Did those allegations of restraint of trade (by the Dow Jones, RCA, GE, etc.) state a claim upon which relief can be granted where evidence supports his allegations that the Dow Jones' refusal to sell was actually a conspiracy undertaken with others and a deliberate attempt to restrain his ability to trade in

regulated securities and raise funds for charities, which is petitioner's business and a legitimate for-profit pursuit.

(10) Should public company shareholders such as those of RCA Corporation retain the rightful authority under the Williams Act, Section 14(e) (once the management of RCA decided to recommend that RCA be sold) to:

(a) be informed of the existence of any standing competing offer to purchase the company previously submitted to management, and

(b) make the determining evaluation of any such offer as to the viability and/or valuation of the competing tender offer (even when uninformed as a result of an alleged management conspiracy with co-defendants Dow Jones to block publication of the competing offer by the Wall Street Journal?

(11) Is the issuance of writ necessary under the circumstances, as a matter of law to impose an equitable facilitation of justice upon the District Court and Appeals

Court Judges Wald, Mikva and Edwards where multiple, erroneous factual conclusions are alleged to have been reached by them on not one shred of supporting evidence.

(12) Was the dismissal affirmation by Appeals Court Judges Wald, Mikva and Edwards effectively a RACIALLY DISCRIMINATORY ENDORSEMENT OF ERROR COMMITTED IN THE LOWER COURT that was also illegally and unconstitutionally biased in favor of the lower court's error and the district court defendants alleged illegal behavior?

(13) Did such an action by Appeals Court Judges Wald, Mikva and Edwards establish a legal precedent--DEFINITION OF REASONABLENESS--applicable to matters of law and constitution that is subject to the racial and economic class prejudicial abuses of adjudicators (permit a new racial "test" for individual blacks seeking to enjoy equal protection of the law in the commercial arena)?

(14) Should the laws governing the securities of public companies such as the Appellee RCA and/or tender offers in connection therewith and should the laws governing access to the marketplace itself have the effect of determining the conditions under which all citizens may participate freely in the contest for corporate governance or should such law simply serve as a vehicle whereby established commercial antagonist may keep petitioner and other would-be competitors away from free access to the marketplace altogether (on a basis of race or perceived economic class)?

THE LIST OF PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

L. NAPOLEON COOPER d/b/a/ LARRY N. COOPER THE PROPRIETORSHIP, 2400 16th Street, N.W., #545, Washington, D.C. 20009; RCA CORPORATION, 1800 K Street, N.W., Washington, D.C. 20006; GENERAL ELECTRIC COMPANY, 1331 Pennsylvania Avenue, N.W., Washington, D.C. 20004; GESUB, INC., 3135 Easton Turnpike,

Fairfield, Connecticut 06431; LAZARD FRERES & COMPANY, One Rockefeller Plaza, New York, New York 10020; DOW JONES & COMPANY, INC., 1025 Connecticut Avenue, N.W., Washington, D.C. 20036; THE WALL STREET JOURNAL, 1025 Connecticut Avenue, N.W., Washington, D.C. 20036; RCA CORPORATION BOARD OF DIRECTORS, 1800 K Street, N.W., Washington, D.C. 20006; GENERAL ELECTRIC COMPANY BOARD OF DIRECTORS, 1331 Pennsylvania Avenue, N.W., Washington, D.C. 20004; THORNTON F. BRADSHAW, 30 Rockefeller Plaza, New York, New York 10020; JOHN F. WELCH, JR., 3135 Easton Turnpike, Fairfield, Connecticut 06431; FELIX ROHATYN, One Rockefeller Plaza, New York, New York 10020; PETER G. SKINNER, 22 Cortlandt Street, New York, New York 10007; WILLIAM CUMMINGS, 420 Lexington Avenue, New York, New York 10007; DAVID E. MORAN, 22 Cortlandt Street, New York, New York 10007;

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2. Doe v. United States Department of Justice, 753 F.2d 1092, 243 U.S. App. D.C. 354 (D.C. Cir. 1985).
3. Humana, Inc. v. American Medicorp, Inc., 445 F.Supp. 613 (S.D. N.Y. 1977).
4. Lewis v. McGraw, 619 F.2d 192, 195-96 (2d Cir.) cert. denied, 449 U.S. 951 (1980).
5. Piper v. Chris-Craft Industries, 430 U.S. 25 (1977).
6. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 240 U.S. App. D.C. 363 cert. granted and vacated, 105 S. Ct. 2353, on remand de Arellano v. Weinberger, 788 F.2d 762 (D.C. Cir. 1984).
7. Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355 (1979).

8. Securities and Exchange Commission v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (1985).

9. TSC Industries, Inc., et al. v. Northway, Inc., 426 U.S. 438 (1976).

10. Voisin v. Bartell Media Corporation, [1981-82 Transfer Binder], Para. 98,486, CCH Fed. Sec. L. Rep. 92,839 (S.D. N.Y. 1982).

11. Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F.Supp. 468 (E.D. Penn. 1978).

REFERRAL TO THE ORDERS AND MEMORANDA FROM THE LOWER COURTS

1. **Order by District Court Judge Harold H. Greene (February 12, 1986) requiring RCA and GE to respond to petitioner's complaint and application for Temporary Restraining Order ("TRO").**

To comply with this order, District Court defendants RCA and GE in their pleadings:

(a) noted that the proposed GE-RCA transaction represented the largest non-oil merger in history. **(Petitioner argued size was not relevant.)**

(b) raised questions about the veracity of petitioner's affidavit in support of his complaint and application for TRO. **(Petitioner submitted sworn affidavit and exhibits totally discrediting all accusations and insinuations.)**

(c) acknowledged that petitioner had in fact on other occasions made offers to purchase "a controlling interest" of other Fortune 500 corporations. **(A fact con-**

veniently ignored by Judges Wald, Mikva and Edwards when they found petitioner had no business that would be applicable to antitrust law considerations.)

(d) alleged that petitioner failed or refused on all such occasions to provide any credible explanation of how he intended to finance these transactions. (Petitioner challenged this conveniently uninformed false allegation by submitting Mobil Oil, Coca-Cola, and BankAmerica exhibits proving otherwise to the sworn affidavit.)

(e) noted that petitioner had been arrested and convicted of illegal, non-violent, political protest acts some 10-14 years prior. (Petitioner conceded this, but had the federal judge and prosecuting U.S. attorney's (in those instances) own words speak to the issue in his sworn affidavit.)

(f) alleged that petitioner's decision to file his action 48 hours before shareholders meeting represented deliberate

bad faith. **(Petitioner exhibits and affidavits proved otherwise.)**

(g) acknowledged that petitioner on "November 21, 1985 sent a letter to RCA proposing to buy approximately 51% of RCA for approximately $3 billion" as "part of a broad visionary plan." **(A fact totally disregarded by Judges Wald, Mikva and Edwards when they acknowledged only petitioner's September 16 letter as a basis for later affirming the dismissal on 12(b)(6) (he never made a tender offer) grounds.)**

(h) acknowledged that petitioner's "complaint alleges that GE and RCA conspired with Dow Jones & Company, owner of The Wall Street Journal, to deny [petitioner] plaintiff the ability to publicize his offer by refusing to sell him advertising space." **(A fact ignored by Judges Wald, Mikva and Edwards when they ruled that petitioner did not allege that antitrust conspiracy was involved. (See complaint at 8, 86, 121, 122, 134, etc., App., pp. 22-37.)**

(i) argued that petitioner's offer was not a tender offer and, accordingly, that Section 14(e) should not apply to RCA management actions in connection with petitioner's offer. (Thereby recognizing that if petitioner's offer was a tender offer, Section 14(e) would apply.)

(j) argued that the concept of materiality under federal securities laws does not require a corporation to include in a serious proxy statement "... disclosure of ... crackpot communication ... received." (Petitioner argued that if RCA management could substantiate same, they could simply have given that description of his tender offer to RCA shareholders in one sentence and been in total compliance with Section 14(e). But to fail to disclose the existence of petitioner's offer (in order to deceive, manipulate and advance the competing GE offer), which they did, violated 14(e).)

2. Memorandum Order of Judge Harold H. Green, signed February 14, 1986, denying

petitioner's application for a Temporary Restraining Order and ordering petitioner to show cause (by sworn affidavit) why his action should not be dismissed as frivolous.

The District Court issued its order denying the TRO on grounds that:

(a) "Consummation of a shareholder vote authorizing the RCA-General Electric merger would not prevent this Court from setting aside the vote at a later date and ordering a new solicitation of proxies and a second shareholder vote.... The injury is therefore not irreparable. **(Petitioner argued tax complications and loss of premium in the market was irreparable.)**

(b) "With regard to [petitioner's] likelihood of success on the merits ... the Memorandum of defendants RCA and General Electric raise serious questions about plaintiff's affidavit and the motivation for his complaint ... [which] ... shows no substantial likelihood of success on the merits and may indeed be frivolous."

(Petitioner had not yet had any opportunity to respond to filings of defendants RCA and GE making these identical allegations.)

3. District Court Order and supporting Memorandum, July 29, 1986 dismissing (under Rule 11) petitioner's Civil Action #86-0373 against all defendants with prejudice.

Judge Greene's Order of July 29, 1986 held that:

(a) "Defendants established beyond peradventure that plaintiff could not possibly obtain funds needed to underwrite his offer for RCA stock." (Judge Greene chose to ignore the fact that no "funds" (not in petitioner's complete control) were required for petitioner's exchange tender offer for RCA stock to succeed.)

(b) "No reasonable person in plaintiff's position could realistically expect to consummate such an offer were it accepted by ... [RCA] shareholders." (No reason was given why Judge Greene felt he could speak for RCA shareholders. No unique

"position," other petitioner's race and/or perceived economic class was any different than that of other succeeding leveraged buyout entrepreneurs.)

(c) "Plaintiff's proposal could not be considered material to any RCA shareholder contemplating the GE/RCA merger." (As petitioner's tender offer was a better deal for RCA shareholders than the offer they finally accepted from GE, why would they not have considered petitioner's offer material?)

(d) "RCA shareholders were not deprived of adequate information with respect to either Cooper's tender offer or General Electric's tender offer because Cooper's proposal was frivolous." (As the district court referred to the GE offer as the GE "tender offer," how could Appeals Court Judges Wald, Mikva and Edwards find that no tender offer was involved as a 12(b)(6) basis for both affirming the district court dismissal and for saying no tender was

involved with the complaint for purposes of Section 14(e).)

Petitioner argued on appeal that:

(a) Judge Greene's judicial action of July 29, 1986 dismissing petitioner's civil complaint (No. 86-0373) against GE, RCA, Dow Jones, etc. as defendants, with prejudice (judgment on the merits), on Rule 11 grounds was unwarranted, illegal, racially-based and that it acted to threaten immediately to drive the petitioner from his business and imposed unwarranted and anticompetitive stumbling blocks to the operation of a free and competitive economy.

(b) Accordingly, Fed.R.Civ.P. 41(b), required that if a court renders judgment on the merits against a plaintiff, the court must make findings of fact as provided for in Fed.R.Civ.P. 52(a) and that for Judge Greene to find as he did amounted to an illegal finding "with prejudice," that signified that the dismissal was an adjudication on the

merits and a bar to any further litigation of petitioner's claim.

(c) The District Court ruling endorsed defendants RCA and GE's argument that the petitioner could "not possibly" obtain funds allegedly needed to "underwrite his tender offer," even where no such funds were needed.

(d) It was illegal for the district court, in view of the fact that petitioner possessed legally issued securities which he proposed RCA shareholders accept in exchange for their RCA stock, to prejudge the securities' value (in favor of RCA and GE) to any given RCA shareholder.

(e) Judge Greene's statements had the effect of a finding that it was "reasonable" for any party to disregard the requirements of the law in dealing with the petitioner as he was not "reasonable" enough to know that in his "position" it would be impossible for him to consummate such a transaction even if the owners of RCA had accepted his offer --

an example of unbelievable race prejudice and economic judicial discrimination.

(f) The district court erred when it (in effect) recognized as permissable violations of securities law by the defendants based entirely on the petitioner's "position." (Out of his place maybe?)

(g) Despite what "position" the court refers to, petitioner was entitled to have the rule of law level the playing field for all to play, not serve merely to limit the ability of outside competitors to join the game.

4. July 30, 1987 Order denying request that United Shareholders Association (independent third party) file amicus curiae brief and ordering appellant to show cause why district court Order of July 29, 1986 not be summarily affirmed.

Appeals Court Judges Starr, Silberman and McGowan held, "[o]n its own motion, that the parties show cause why district court order dismissing appellant's complaint

pursuant to Rule 11 ... should not be summarily affirmed for reasons stated by the district court or on another basis."

Petitioner in turn argued that:

(a) A shameful miscarriage of justice had occurred, as no evidence substantiated in any way that petitioner's offer was not reasonable in any manner, or unacceptable to a "reasonable" financial marketplace. **(Yet action dismissed was on that basis.)**

(b) That this so-called "reasonable" assumption was in fact race-based and would appear reasonable only in a racist circle of white citizens around a white hot fire in white robes.

(c) That the legal consequence of such a ruling had the effect of legitimizing for black financial entrepreneurs a prejudicial "race test."

(d) That the district court could easily have confirmed the legality and marketability of the existing securities petitioner proposed to exchange for the

shares of RCA Corporation within the context of the Federal Reserve System Regulation G (which routinely qualifies or disqualifies such securities), and not simply find that he was not "reasonable" enough to realize that what he was attempting to accomplish "could not possibly" be done by a person in "his position."

5. October 9, 1987 Order of Court of Appeals Judges Wald, Mikva and Edwards order that (1) the show cause order be discharged, (2) the district court erred when dismissing petitioner's complaint under Rule 11, Fed. R. Civ. P., and (3) the district court dismissal of appellant's complaint be nonetheless summarily affirmed (see Memorandum in lieu of opinion in support of that Order) on 12(b)(6) failure to state a claim grounds.

Appeals Court Judges Wald, Mikva and Edwards held in their order that:

(a) "Cooper alleged that the defendants committed fraud by conspiring to withhold from [RCA] shareholders information

about his offer for RCA stock in violation of Section 14(e)." (A claim for which relief can be granted petitioner argued.)

(b) "He also alleged that Dow Jones and its officers violated Section 1 of the Sherman Act and Section 13 of Robinson-Patman by refusing to sell advertising space to him." (As the purpose of their conspiracy was to restrain trade petitioner argued.)

(c) "Cooper sought damages of $78 million and declaratory and injunctive relief. (As evidence is available to prove these claims, petitioner argued that damages would be legal if awarded under the antitrust laws and were made payable by the regulated class only.)

(d) "Dismissal of a complaint as frivolous is not appropriate." (Neither was a dismissal on 12(b)(6) grounds, petitioner argued.)

(e) "Cooper alleges that defendants committed fraud by conspiring to withhold information about his offer for RCA

stock in violation of Section 14(e)." **(A valid claim; did they or didn't they?)**

(f) "This section [14(e)] applies only when a tender offer has been made. ... Cooper's complaint and affidavit ... make clear that Cooper never made a tender offer." **(Complaint extracts, paras. at 73-78, App., p. 26, say exactly the opposite, reading "The Tender Offer," etc.)**

(g) "His various letters refer only to prospective plans for offers that were never carried out ... (September 16, 1985 letter to various defendants...." **(The record, sworn affidavit exhibits in the district court, and pleadings say exactly the opposite. See Affidavit Exhibits 3b, 3c and 39 at App., pp. 41 and 50.)**

(h) "Cooper does not allege that he ever made an offer to purchase RCA shares ... to any RCA shareholders.... Because there was no solicitation Cooper failed to state a claim under Section 14(e)." **(Complaint says just the opposite and his solicitation (as**

opposed to the RCA solicitation for the GE offer) was admittedly blocked by co-conspirator Dow Jones and other defendants.)

(i) "Cooper also alleges that GE and RCA conspired with Dow Jones to refuse to sell advertising space to him and thereby restrain trade in RCA stock." (This would be a flat allegation of conspiracy for anyone else. If provable, relief would be granted under antitrust law. Yet Judges Wald, Mikva and Edwards held that no sufficient antitrust allegation was even made by petitioner despite complaint extracts, paras. 8, 86, 128, 129, 122, 134, etc. (App., pp. 22-36).)

(j) "Officers or employees of the same firm do not provide the plurality of actors imperative for a Section 1 conspiracy." (RCA, GE, Dow Jones and The Wall Street Journal employees are not one and the same; plurality of actors exists.)

(k) "Cooper alleged that he suffered a loss in excess of $78 million because he has been forced to forego his

planned purchase of RCA stock." (Evidence will substantiate this claim (at App., pp. 34-35.)

(1) These damage claims are frivolous in light of the fact that Dow Jones' refusal to publish Cooper's advertisement [regarding his offer] did not prevent him from otherwise purchasing RCA stock. (The record proves just the opposite (complaint extracts, paras. 74, 75 and 77(c) and (d), App., p. 26).)

STATEMENT OF SUPREME COURT JURISDICTION

This application that writ be issued is submitted to obtain relief for the petitioner from the arbitrary, capricious, discriminatory and illegal actions of Chief Judge Patricia M. Wald and Circuit Judges Abner J. Mikva and Harry T. Edwards taken against him in connection with his Civil Action Number 86-7005 before the United States Court of Appeals for the District of Columbia Circuit.

Petitioner alleges that a series of gross and violent black-letter law violations

were committed against him and that the denial of equal protection and due process of law rights resulted from the alleged illegal acts of the Judges which warrants the exercise of the Supreme Court's discretionary powers. Supreme Court action would be in aid of its appellate jurisdiction, as relief for petitioner cannot be had in any other form from any other court.

Petitioner's suggestion that his action be heard by the Court of Appeals en banc was denied August 18, 1987 and his Petition for Rehearing, submitted to Judges Wald, Mikva and Edwards, was denied without comment on November 10, 1987.

Petitioner is not entitled as a matter of legal right to have his action reviewed on appeal nor on writ of certiorari and therefore his only right to review under law is pursuant to Supreme Court Rules 26 and 27 which govern the issuance of the extraordinary writs herein requested.

The order to be reviewed is that of October 9, 1987 under the signature of Judges Wald, Mikva and Edwards which summarily affirmed the dismissal of petitioner's action by the district court (July 29, 1986) even though on different (12(b)(6)) grounds than the District Court used.

28 U.S.C. 1651(a) reads as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, CITES AND RULES WHICH THE CASE INVOLVES

The pertinent text of the following citations has been set forth in the Appendix or text as indicated.

APPENDIX CITES

A. Constitutional provisions (App., p. 52).

B. Statutes, U.S.C. 28 1651(a) and (b)) (App., p. 53).

C. Federal Rules of Civil Procedure, 12(b)(6), 41(b), 52(a) (App., p. 54).

D. Rules of the Supreme Court, 26 and 27 (App., p. 60).

E. Definition (Black's Law) of Appellate Jurisdiction (App., p. 63).

TEXT CITES

15 U.S.C. Sec. 78n(e) (1981), Section 2(e) of the Robinson-Patman Act, 15 U.S.C. Sec. 13(e) and Section 1 of the Sherman Act, 15 U.S.C. Section 1 (Supp. 1987). (See pp. 34, 35 and 50, below.)

STATEMENT OF THE CASE (INCLUDING ORIGINAL BASIS FOR FEDERAL JURISDICTION)

This was a non-lawyer, pro se action seeking declaratory, injunctive and compensatory relief. Petitioner sought to restrain Defendant RCA Corporation ("RCA") (and those persons in active concert or participation

with them) from proceeding with the vote on the RCA-General Electric Company ("GE") merger agreement which was scheduled to take place at a special meeting of RCA shareholders on Thursday, February 13, 1986, alleging RCA management violated Sec. 14(e) by failing (in an effort to deceive and manipulate RCA shareholders being asked to tender their shares) to disclose that plaintiff's superior offer to purchase existed while recommending the sale by RCA shareholders of their securities to GE (in connection with the GE effort to take control of RCA at a premium price over market (a tender offer)).

Petitioner asked the district court to require defendant RCA to disclose to uninformed and unsuspecting RCA shareholders the existence of petitioner's then-pending competing tender offer (formally submitted to RCA management) to purchase RCA shares, in accordance with the Williams Act (14(e)) provision.

The Wall Street Journal was alleged to be a co-conspirator in the petitioner's complaint, along with GE, RCA and other district court defendants, including the GE and RCA Boards of Directors.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The complaint was filed and the jurisdiction of the federal district court was originally invoked to obtain civil relief against defendants alleging that their actions involved violations of Section 14(e) of the Williams Act (material omission) of the Securities Exchange Act of 1934; 15 U.S.C. Sec. 78n(e); Section 1 of the Sherman Act, 15 U.S.C. Sec. 1; and Section 13 of the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. Sec. 13e.

Jurisdiction was said to be conferred on the court by: (1) Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78aa, which gives the district court's exclusive jurisdiction over violations of the Williams Act and 15 U.S.C. Sec. 15 antitrust

laws; (2) Section 1337 of the Judicial Code, 28 U.S.C. Sec. 1337 (1982), in that this action arose under an Act of Congress regulating commerce; (3) Section 1331 of the Judicial Code, 28 U.S.C. Sec. 1331, in that the action arose under the laws of the United States (federal question); and (4) Section 1332 of the Judicial Code, 28 U.S.C. Sec. 1332, in that there was diversity of citizenship between the plaintiff and all defendants and that the sum or value in controversy, exclusive of interests and costs, exceeded $10,000.

Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. Sec. 78n(e) (1981) provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any

such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. Sec. 13(e) provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1 (Supp. 1987), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a

corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

FACTUAL SUMMARY-CASE HISTORY

On September 16, 1985, petitioner gave formal notice to RCA management/directors of his intention to submit to them an offer to purchase the RCA Corporation directly from RCA shareholders **(a fact not in dispute).**

On October 1, 1985, the petitioner sent another formal notice to the management of RCA **"Re: Acquisition of RCA Corporation"** stating that it was a "studied notification of interest to undertake an offer to purchase RCA Corporation ... and of a willingness ... to negotiate." **(Not disputed.)**

On November 21, 1985, plaintiff submitted to RCA management and directors, through its President and Chief Executive Officer, Mr. Robert R. Frederick, a "formal" offer to purchase (tender exchange offer) whereby a debt security package with a face amount of $66.17 per share was offered to RCA

shareholder for 4.999% or 4,484,103 shares of RCA common stock, subject to a negotiated acquisition pact, or the tender to the offer by holders of a controlling interest, 80%, or 71,760,000 common shares. Petitioner stated that his plan called for him to exchange existing debt securities acquired from Project 76 - An American Affair, Inc. (a non-profit publicly charitable corporation) and for him to issue for exchange new RCA debt securities once he gained the support of a controlling interest of RCA shareholders. The $66.17 face amount exchange offer made by petitioner could by March 1986 be valued by RCA shareholders from a low of $76.86 per share to a high of $112.49 per share depending on certain tax and other considerations. On September 16, 1985 when the offer notice was submitted to RCA management, RCA stock was selling for approximately $31 (of the $66.17 face amount of the note combination), representing a substantial premium over market.

On November 29, 1985, petitioner sent another formal letter to the management and directors in "Re: **Initiation of Acquisition of RCA Equity.**" This letter advised "that the [petitioner] ha[d] commenced an initiative in which it is attempting to negotiate the ... purchase of RCA Corporation ... and to commit certain owners to tender their RCA shares prior to announcement of identical terms and conditions to the general public ... and for [RCA management/directors to] expect [despite their having ignored the formal offer] to receive ... additional details on the day the offer to purchase is published."

The Wall Street Journal blocked publication of Petitioner's RCA offering announcement and within days (by December 6, 1985) RCA and GE managements were meeting secretly.

On December 11, 1985, RCA and GE agreed to a business combination whereby GE would offer to purchase all of RCA's outstanding common shares tendered at $66.50 (actual

market value was viewed to be as low as $59.97 by the stock market). GE's stated objective was to buy all the shares of RCA (as it ultimately did) in order to gain complete control of RCA (a classic tender offer fingerprint).

The total value of petitioner's offer to RCA shareholders in excess of GE's offer (based on 90 million common shares outstanding) ranged from a low of $1,520,100,000, or $16.89 per share, to a high of $4,726,800,000, or $52.52 per share.

On January 13, 1986, RCA sent to all its shareholders a proxy statement in which it announced a special February 13, 1986 meeting (during which a vote on the merger agreement between RCA and GE would be conducted) and recommended to RCA shareholders that they vote their approval of the merger and subsequently tender their securities to GE and enclosed a proxy and solicitation for that purpose. No disclosure of the existence of petitioner's pending competing offer to

purchase was made in the proxy solicitation, and material misstatements were made.

On February 10, 1986, in the U.S. District Court for the District of Columbia, petitioner brought an action at law for disclosure and damages and sought equitable and injunctive relief to stop the voting until a determination on the merits could be made.

On February 12, 1986, the district court ordered defendants RCA and GE to respond to petitioner's complaint. (They did with the litany of insinuations and charges against the petitioner (referred to above, pp. 13-16), including that he had not in the past been willing to explain how he would finance his offer, that he could not finance the offer he had submitted, that he was acting in bad faith, etc.).

On February 14, 1986, the district court denied petitioner's request for injunction on grounds that his claims were questionable and ordered that petitioner file affidavits

answering defendants' charges of bad faith lest his action and complaint be dismissed under Rule 11 as frivolous.

On February 20, 1986, petitioner so responded and also filed an application for preliminary injunction on the basis of Weeks Dredging & Contracting, Inc. v. American Dredging Co. ("Weeks"), 451 F.Supp. 468 (1978) (see App. at p. 78), and Humana, Inc. v. American Medicorp, Inc. ("Humana"), 445 F.Supp. 615 (S.D. NY 1977) (see App., p. 66).

He argued that in Weeks, the Court ruled that a competing tender offeror has standing under the Williams Act to seek preliminary and final injunctive relief. The Court stated that the Supreme Court (in Piper v. Chris-Craft Industries ("Piper"), 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed. 2d 124 (1977) (see App. at pp. 68-71) had concluded that a tender offeror does not have an implied cause of action for damages under Section 14(e). The Court's rationale in Weeks was that

employing injunctive relief for a tender offeror under the Williams Act would not be inconsistent with the legislative scheme because, unlike a damage remedy, the injunctive remedy does not appear to impose any burden upon investors when it is properly invoked, holding that, "If an injunction is not issued prior to the shareholders' voting, it will prevent the shareholders from making informed decisions."

Humana (App., p. 66) also states the proposition that a tender offeror has the right to sue for injunctive relief under the Williams Act if the shareholders or investors of the target company would benefit if the allegations of the complaint are true and the relief is granted.

The petitioner sought to force defendant RCA and others to disclose material information to the protected class (RCA shareholders) in its proxy solicitation statement. In recommending GE's tender offer, RCA management should also have disclosed the

existence of the other pending tender offer submitted to them (petitioner's). To not do so was misleading, deceptive, manipulative, misrepresentative and a material omission.

In TSC Industries, Inc. et al. v. Northway, Inc., 426 U.S. 438 (1976), the Supreme Court ruled that an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. See, also, Seaboard World Airlines, Inc. v. Tiger International, 600 F.2d 355 (1979) (see App. at p. 73).

Petitioner's competing offer was important in deciding how to vote as it offered superior form and financial return.

Petitioner argued that defendants' failure to disclose and the conspiracy to block his public announcement from reaching RCA shareholders caused him to sustain a $78,750,000 loss.

Petitioner argued that defendants (regulated class) should be held financially

accountable in order to compensate protected RCA investors (the protected shareholder class) for losses they too sustained.

On July 29, 1986 the district court ruled that petitioner's complaint be dismissed under Rule 11, with prejudice, going to the merits of petitioner's action (see App., p. 5).

August 4, 1986 Petitioner noticed appeal and sought to have **evidentiary** hearings ordered.

On August 18, 1987 the request that an en banc hearing take place was denied.

On October 9, 1987, Judges Wald, Mikva and Edwards found that the district court erred by dismissing petitioner's action under Rule 11, but **should** have dismissed petitioner's complaint on Rule 12(b)(6) grounds.

On November 10, 1987 petition for rehearing was denied.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT; PRELIMINARY STATEMENT OF RELATED IMPORTANT ISSUES

Lower courts and defendants GE and Gesub, Inc., RCA, Thornton F. Bradshaw, Lazard Freres & Co., Felix Rohatyn and others argued, among other things, that petitioner either failed to state a claim, court review was not warranted by existing law or a good faith argument for the extension, modification or reversal of such law, that Cooper's "offer" expired by its terms, that no shareholder could have considered Cooper's "offer" to be of any significance in deciding how to vote on the GE/RCA merger, that while Cooper's papers suggest that some of his proposals were actually presented by corporate managers to their boards of directors, **"there is no substantiation for this,"** that Cooper chose to present nothing to RCA's shareholders, that Cooper neither pleaded nor suffered any injury to his trade or business cognizable under the antitrust laws, and that

disclosure of petitioner's "offer" would have confused shareholders.

Petitioner did submit a formal offer to defendant RCA on November 21, 1985 (see district court Affidavit, Exhibit 3c, at App., p. 41) and initiated same in his November 29, 1985 letter (see district court Affidavit, Exhibit 3d at App., p. 40). Accordingly, the offer did not expire by its own terms.

The petitioner's offer, even citing the unrealistically low valuation given by defendants, was far superior ($3.80 or 106%) to the $62.37 value placed on the GE offer by the New York Stock Exchange as of Friday, March 7, 1986 (long after the complaint filing).

Petitioner's two-stage tender offer was subject to an automatic second-stage 14d-1 filing with the Securities and Exchange Commission ("SEC") covering virtually 100% of all RCA outstanding common shares.

Petitioner explained in his offer, pleadings and complaint (for complaint extracts, paras. 74-75, 77(c) and (d) at App., pp. 26-29) that he proposed to finance the transaction through an exchange of Project 76 securities and the creation for exchange of new RCA debt securities to be issued once he gained control or the support of a controlling interest in RCA common shares (for district court Affidavit, Exhibit 3c, see App., p. 41).

Petitioner also argued that RCA's management and directors were specifically and legally required to make a determination with regard to his offer and to advise RCA shareholders and to include knowledge of the existence of petitioner's competing offer in its official proxy statement of January 13, 1986 especially because they were recommending to RCA shareholders that they sell out to the GE tender offer.

So far, the regulated class has escaped (under existing judicial interpretation),

paying financial damages to the protected class when found guilty of violations of Section 14(e). This action seeks a precedent Section 14(e) action for the assessment of damages against the regulated class. In this respect, there is a good faith argument for the extension of existing case law (i.e., Section 14(e) should have sharper teeth).

The lower court defendants should not have conspired to subvert (deliberately) economically beneficial competition or restrained petitioner's freedom to trade (by refusing to sell advertising space to announce his offer) at the expense of RCA shareholders. **Petitioner sought only to compete on an equal footing with his GE competition for control of RCA.**

As RCA shareholders did agree (on an uninformed basis) to sell out their interest in the RCA Corporation, logic dictates that they would have considered any competing offer that demonstrated superiority in either price or form.

Petitioner raised the issue that whether defendants' violations occurred in connection with the GE/RCA tender offer Agreement, the related proxy solicitation, petitioner's tender offer, or all three, the action was triable in the federal Court, and, as two tender offers were at issue, Section 14(e) did apply. The defendants' only concern was to manipulate the outcome of the GE tender offer.

Defendants never disputed that petitioner's offer was received, was not investigated, and that there was no disclosure of its existence to RCA shareholders by the defendant RCA or GE managements in RCA's solicitation on behalf of the GE offer.

No one disputed that petitioner had a sufficient face amount of charitable securities to purchase 100% of RCA common stock. The petitioner was never free to publicize his offer in the Wall Street Journal, and even defendants GE and RCA (in their February 12, 1986 pleading) did not dispute that

petitioner had a "history of contesting for the control of major American corporations" (petitioner's alleged business).

FAILURE TO STATE CLAIM 12(B)(6) DISMISSAL ORDER ISSUES

Here we had a lone, non-lawyer, pro se plaintiff pitted against the might of "Wall Street's Finest." That reality permeated his case from the beginning and (petitioner respectfully submits) probably influenced the district court's and Appeals Court Judges Wald, Mikva and Edwards' decisions to dismiss this case on totally improper grounds.

It is black-letter law that petitioner's action may not have been dismissed [on 12(b)(6) grounds] unless the complaint failed to allege sufficient information to demonstrate entitlement to relief. District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 243 U.S. App. D.C. 1 (D.C. Cir. 1984). Moreover, to avoid dismissal, petitioner need not have presented any proof of his claims, but need only have alleged sufficient facts

to establish a cause of action (see App., p. 64).

The Supreme Court and the Appeals Court for the D.C. Circuit in other cases have held that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that petitioner can prove no set of facts in support of his claim which would entitle him to relief. DOE v. U.S. Dept. of Justice, 753 F.2d 1092, 243 U.S. App. D.C. 354 (D.C. Cir. 1985) (see App., p. 65), Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 240 U.S. App. D.C. 363 cert. granted and vacated, 105 S. Ct. 2353 (see App. at p. 72), on remand de Arellano v. Weinberger, 788 F.2d 762 (D.C. Cir. 1984).

To say that petitioner did not allege sufficient information in his complaint that would entitle him to relief did violent injustice to this fundamental tenet of federal procedure. Petitioner not only alleged sufficient facts entitling him to relief; he also produced credible proof

thereof, even though he was under no obligation to do so.

For original paragraph extracts of the Complaint, see Appendix at pages 22-37: Dow Jones conspiracy allegations (paras. 8, 86, 120, 122, 128, 129, 134); petitioner's Dow Jones damage claim allegations (paras. 120, 122, 134-135), allegations regarding Dow Jones publication refusal (paras. 54, 55, 62, 63); allegation regarding restraint of petitioner's right to trade by Dow Jones and others (paras. 125, 128, 129, 134); allegations regarding "The Tender Offer," premium over market price, etc. (paras. 73-78, 83); allegations regarding conspiracy to deceive and manipulate the protected shareholder class and violate Section 14(e) (paras. 94, 134, 106).

Appeals Court Judges Wald, Mikva and Edwards found that the district court erred when they dismissed the petitioner's action. Yet, they themselves erred when stating that petitioner failed to state a claim under

Section 14(e). Petitioner's complaint detailed not only the fact that he made the tender offer, but he set out that offer in full detail. (See, complaint, paras. 73-78, at App., p. 26 ("The Tender Offer").) Moreover, as RCA has acknowledged that its management/directors (438,737 common shares beneficially owned) received petitioner's tender offer, it cannot be plausibly argued that petitioner never submitted his offer to any RCA shareholder.

To say that petitioner's offer to purchase was not a tender offer or even that petitioner did not possess the financial means to support the offer are factual questions that go to the ultimate issues of this case and should not have been dismissed with the back of the hand.

Petitioner needed only allege (as he did) that the defendants' failure to disclose the existence of his pending competing tender offer to purchase had the effect of deceiving or manipulating RCA shareholders. (See

paras. 8, 86, 94, 106, 125, 134, etc. at App. pp. 22-37.)

RCA management disputed the valuation of petitioner's offer, but never disputed (at all) that they failed to disclose the existence of same when recommending, through "solicitation" (January 13, 1986), the GE tender offer or when describing "relative" events.

GE's "tender offer" (recognized as such in the district court memorandum order dated July 29, 1986) for RCA shares and that of the petitioner were both made at a substantial premium over market for RCA shares (see chart in App. at p. 48). Both offers were conditional upon the tender to the offers of a minimum number of shares or upon the support of a controlling number of RCA shareholders (see App., p. 74). By definition, that made the GE offer a tender offer and the petitioner's formal offer also a tender offer (see SEC v. Carter Hawley Hale

Stores, 760 F.2d 945 (1985) excerpts at App., p. 74.)

There was simply no basis for finding, especially at that preliminary stage of the proceedings, that the petitioner's tender offer was anything other than a tender offer. The fact that the defendants acknowledged obstruction of the publication of his tender offer, should not have led Judges Wald, Mikva and Edwards to find that 14(e) did not apply because the defendants succeeded in blocking publication.

Appeals court Judges Wald, Mikva and Edwards should not have unfairly discounted crucial and dispositive evidence in the official court record (see Affidavit, Exhibits 3b, 3c and 3d at App., pp. 40, 41 and 50), including that petitioner's formal offer to purchase was at a premium over market, and subject to the tender of a controlling interest of RCA shareholders, both of which are recognized fingerprints of a tender offer. (see App. for extracts of

Voisin v. Bartell Media Corp., CCH 1982 Binder, Paras 9846 (at p. 76), Piper v. Chris-Craft Industries, 430 U.S. 26-28 (at pp. 68-70), and Lewis v. McGraw, 619 F.2d 192 (1980) (at p. 67).

Accordingly, any failure by GE, RCA or Lazard Freres & Co. to disclose, participate or facilitate the failure to disclose such information (such as Dow Jones and the Wall Street Journal did), in connection with either offer was illegal under Section 14(e) (see Weeks Dredging and Construction v. American Dredging Co., 45 F.Supp. 468 (1978) (at p. 78), Humana, Inc. v. American Medicorp, Inc., 445 F.Supp. 613 (1977) (at p. 66), and Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355 (1979) (at p. 73).) The simple allegation that they conspired together to do it stated a clear claim for which relief can be granted.

The petitioner alleged that GE, RCA and Lazard Freres allowed the material omissions,

perpetuated others and made material misstatements to RCA shareholders (the purpose being to deny RCA shareholders adequate information), and they failed to disclose the manipulative and deceptive Lazard Freres role in the negotiations with GE that advanced GE's ability to acquire control of RCA.

As the Dow Jones defendant was alleged to have deliberately kept material information away from RCA and other shareholders by refusing to sell advertising space to the petitioner in a conspiratorial attempt to restrain trade and competition, they violated Section 1 of the Sherman Antitrust Act. (See original complaint extracts at App., pp. 22-37).

CONCLUSION
WHY WRIT SHOULD ISSUE
IN 12(B)(6) CONTEXT

Judges Wald, Mikva and Edwards said that petitioner Cooper never alleged that defendant Dow Jones conspired with others and therefore he did not state an antitrust claim

from which relief could be granted. (The complaint extracts at pp. 22-37, paras. 8, 84, 134, etc. prove the opposite.)

Judges Wald, Mikva and Edwards ignored all legal precedent defining a tender offer (See Appendix for case extracts, Lewis v McGraw (p. 67), Piper (pp. 68-70), Voisin v. Bartell (p. 76), and SEC v. Carter Hawley (p. 74)), ignored evidence that a formal tender offer had been made by petitioner (see App., p. 26, para. 73); ignored the allegations made in the complaint that a tender was made, and ignored the fact that the tender offer was set out in full detail in that same complaint (see paras. 73-78 and App. at "The Tender Offer," App., pp. 26-29).

These actions (by Judges Wald, Mikva and Edwards) radically violated black-letter law and equity such that extraordinary relief is the petitioner's only option (as petitioner is not entitled by right to be heard on appeal by the Supreme Court of the United

States and previous en banc and rehearing requests were denied).

The District Court dismissed petitioner's complaint under Rule 11 (with prejudice) on the basis of a finding of fact going to the merits of petitioner's complaint on circumstances that left only petitioner's race and perceived economic class as mitigating factors. Judges Wald, Mikva and Edwards erred when they affirmed that dismissal.

They erred when they fail to order that evidentiary hearings be held and when they never questioned just what the district court meant when it held that no "reasonable person in petitioner's position ... [and] ... no reasonable [RCA] shareholder" would accept such an offer and no such offer could be consummated even if RCA shareholders "accepted" it.

Race and perceived class were the only differences between petitioner and his peers participating in petitioner's line of

business (non-cash, leveraged buyout business) at that time.

Any fair or objective viewing of the facts before this Court reveals:

(1) That petitioner's complaint at paragraphs 73-78 alleges that he made a tender offer and, further, set out the tender offer in full detail.

(2) The petitioner supplied proof that after his first September 16, 1985 letter, RCA management received others, including his November 21 letter (containing formal offer and terms and conditions) and his November 29, 1985 letter, initiating same offer.

(3) Petitioner had no choice but to seek the issuance of writ hoping that this honorable Court would slap down this travesty in an exercise of its appellate jurisdiction.

(4) Petitioner both (a) explained his plan to the management of the Mobil Oil Corporation (see Affidavit Exhibit, text of April 8, 1985 Mobil letter to petitioner at App., p. 38); other examples include Coca-

Cola Company, Halliburton, Inc., AMR, etc.), and (b) that the management of the BankAmerica Corporation made a presentation of petitioner's plan to the BankAmerica November 4, 1985 Board of Directors meeting (see Affidavit Exhibit, text of BankAmerica November 5, 1985 letter to petitioner at App., p. 51).

(5) Petitioner clearly established that he sought to gain control of RCA, sought to publicize his offer to purchase RCA stock in the Wall Street Journal, made his offer contingent upon the tender of a controlling number of RCA shareholders (see App. at p. 41), offered a premium price for RCA shares, and allowed that he would ultimately purchase up to 100% of all tendered RCA shares, subject to negotiation, etc.

(6) Judges Wald, Mikva and Edwards cited Piper (in which at pages 26-28 the Supreme Court discusses the legislative intent (to protect shareholders "by requiring the disclosure of pertinent information to

stockholders when persons seeking to obtain control of a corporation....," 113 Cong. Rec. 854 (1967), etc.); Lewis v. McGraw, 619 F.2d 192, 195-96 (2d Cir.), cert. denied, 449 U.S. 951, 1980; and Voisin v. Bartell Media Corp. [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 98,486 at 92,845-46 (S.D.N.Y. 1982), to justify finding that petitioner failed to state a claim for which 14(e) relief could be granted (in spite of the evidence, see App. at pp. 22-37 for original Complaint paragraphs 8, 78-78, 86, 94, 106, 120-122, 125, 128, 129, 134, 135, etc.).

(7) In the Lewis v. McGraw case, there was an agreement between the litigants that no tender offer was involved (see App., p. 67).

(8) In the Voisin v. Bartell Media Corp. case (see App., p. 76), the Court found that as the party against whom the Williams Act was sought to be applied already had control of the company in question and was not seeking control.

(9) Citing those cases in the instant circumstances was wrong and put forth a new definition of a tender offer found nowhere else in law or precedent and one that contradicted the Supreme Court, the lower court record and petitioner's complaint.

(10) Piper, Voisin and Lewis all set out conditions where Section 14(e) is applicable. (See App., pp. 67, 69 and 76).

(11) Judges Wald, Mikva and Edwards, at page 5 of the October 9, 1987 Order Memorandum, state clearly that "Cooper also alleges that GE and RCA conspired with Dow Jones (the publisher of the Wall Street Journal) to refuse to sell advertising space to him and thereby restrained trade in RCA stock." (See App. at paras. 8, 86, 134, etc., pp. 22-37).

(12) Even the lower court defendants conceded that petitioner had a history of attempting to gain control of public companies, and despite petitioner's alleged damages (as in his original complaint at paragraphs 120-122, 134, 135, etc., App. pp.

22-37), Judges Wald, Mikva and Edwards took the view that he failed to allege he suffered any injury to his trade or business.

(13) Petitioner alleged and sought to recover from the regulated class $78 million in damages on grounds that defendants interfered with his right and ability to trade (see complaint at paragraph 120-122 and 134, 135, App., pp. 32-35 and 35-36).

(14) Judges Wald, Mikva and Edwards held that because defendants succeeded in keeping petitioner from reaching RCA shareholders to solicit their support, even though he was seeking control of RCA at a premium, the defendants can now say that Cooper's offer is not an offer because he could have bought RCA shares under his plan without a public announcement. Yet, under petitioner's plan he could not purchase even one RCA share without the support of a controlling interest of RCA shareholders (see App. at pp. 26-29).

No citizen should have to petition the highest court in the land for equal justice

where circumstances such as the above speak so clearly that writ should issue so that the evidence in this action may be properly ruled upon in the lower courts in accordance with law and equity.

Supreme Court, U.S.
FILED
FEB 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1316

Civil Action Number ____

THE UNITED STATES SUPREME COURT

Term: October 1987

IN RE: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER THE PROPRIETORSHIP

APPENDIX

ON WRIT OF MANDAMUS AND PROHIBITION
IN THE ALTERNATIVE TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT ISSUE

L. Napoleon Cooper
2400 16th Street, N.W., #545
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Pro se

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Text of U.S. District Court Order (Judge Harold H. Greene), Civil Action No. 86-0373, February 12, 1986

ORDER

Upon consideration of plaintiff's motion for a temporary restraining order and accompanying memoranda, exhibits and affidavits, it is this 11th day of February, 1986

ORDERED that defendants RCA Corporation and General Electric Corporation file, on or before February 12, 1986, a preliminary response to plaintiff's motion.

Text of U.S. District Court Order (Judge Harold H. Greene), Civil Action No. 86-0373, July 29, 1986

ORDER

In accordance with the Memorandum issued this date, it is this 29th day of July, 1986

ORDERED that this action be and it is hereby dismissed under Fed. R. Civ. P. 11 as to all defendants with prejudice.

Text of U.S. District Court Memorandum (Judge Harold H. Greene), Civil Action No. 86-0373, July 29, 1986

MEMORANDUM

Plaintiff L. Napoleon Cooper, proceeding pro se, seeks declaratory, injunctive and compensatory relief under section 14(e) of the Williams Act, 15 U.S.C. Sec. 78n(e) and various other statutes. The defendants have moved to dismiss under Fed. R. Civ. P. 11, arguing that the action is frivolous and brought in bad faith.

The gravamen of plaintiff's complaint is that certain of the defendants neglected to disclose to stockholders of the RCA Corporation plaintiff's November 21, 1985 offer to purchase 4.99% of the shares of RCA for approximately $300 million. RCA shareholders subsequently voted -- on February 13, 1986 -- to accept a merger with defendant General Electric Company valued at $6.3 billion. That same day, this Court refused to issue a

temporary restraining order halting the proposed merger, after concluding that many of plaintiff's allegations were of dubious credibility and that he could not demonstrate a likelihood of success on the merits.

The Court need not speculate further on the precise motivations that led plaintiff to initiate his tender offer and this suit. Defendants have established beyond peradventure that plaintiff could not possible obtain the funds needed to underwrite his "offer" for RCA stock. Indeed, no reasonable person in plaintiff's position could realistically expect to consummate such an offer were it accepted by the shareholders. More importantly, no reasonable shareholder would treat plaintiff's proposal seriously. Thus, whether plaintiff's offer and this litigation were instituted for malevolent or altruistic purposes, it is clear that plaintiff's proposal could not be considered material to any RCA shareholder contemplating the GE-RCA merger. Section 14(e) of the

Williams Act is designed "to ensure that [investors] will not be required to respond [to a tender offer] without adequate information." Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975)). RCA shareholders were not deprived of adequate information with respect to either Cooper's tender offer (if it was such under the statute) or General Electric's tender offer, because Cooper's proposal was frivolous. Cooper's lawsuit to enforce section 14(e) is similarly frivolous, and properly dismissed under Rule 11. See Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979); Brown v. District Unemployment Board, 411 F. Supp. 1001 (D.D.C. 1975).

Accordingly, this action will be dismissed. An appropriate order accompanies this Memorandum.

Text of U.S. Court of Appeals Order, CA No. 80-99363, July 30, 1987

O R D E R

Upon consideration of the Motion to have this Court of Appeals Request that the United Shareholders Association (Independent Third Party) file an Amicus Curiae Brief in this Action and the Opposition and Reply thereto, it is

ORDERED by the court that the motion to have this court request that the United Shareholders Association file an amicus curiae brief in this action be denied. The United Shareholders Association has not sought leave to file an amicus curiae brief itself, and the appellant has not shown that such a brief would be helpful in deciding this appeal. It is

FURTHER ORDERED by the court, on its own motion, that the parties show cause within fifteen days of the date this order is filed why the district court order dismissing

appellant's complaint pursuant to Rule 11 of the Federal Rules of Civil Procedure should not be summarily affirmed for the reasons stated by the district court or on another basis.

The Clerk is directed to send a copy of this order to appellant both by certified mail, return receipt requested, and by first class mail.

Per Curiam

Text of U.S. Court of Appeals Order, CA No. 80-00373, August 18, 1987

O R D E R

Appellant's suggestion that this appeal be heard initially en banc, filed September 8, 1986, has been circulated to the full Court. No member of the Court requested the taking of a vote on the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that appellant's suggestion is denied.

Text of U.S. Court of Appeals Order, C.A. 86-00373, October 9, 1987

O R D E R

Upon consideration of the order to show cause why the district court's order should not be summarily affirmed, and the responses thereto, it is

ORDERED by the court that the order to show cause be discharged. It is

FURTHER ORDERED by the court that the district court order dismissing appellant's complaint be summarily affirmed for the reasons set forth in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Text of Court of Appeals Memorandum, C.A. No. 86-7005, October 9, 1987

MEMORANDUM

On February 10, 1986, L. Napoleon Cooper, proceeding pro se, filed this action against the RCA Corporation ("RCA"), General Electric Company ("GE"), Dow Jones Company, Inc. ("Dow Jones"), the Wall Street Journal, Lazard Freres & Company, and various directors and officers of those defendants. Cooper alleged that the defendants committed fraud by conspiring to withhold from shareholders information about his offer for RCA stock in violation of Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. Sec. 78n(e) (1982). See Complaint at paragraphs 90-118. He also alleged that Dow Jones and its officers violated Section 1 of the Robinson-Patman Act, 15 U.S. C. Sec. 13 (1982), by refusing to sell advertising space to him. See id. at paragraphs 119-29. Cooper sought damages of $78 million and

declaratory and injunctive relief.

On July 29, 1986, after numerous submissions from the parties, the district court granted a motion to dismiss the action under Rule 11 of the Federal Rules of Civil Procedure as frivolous, and Cooper noticed his appeal. This court issued an order to show cause why the district court's order should not be summarily affirmed for the reasons stated by the district court or on another basis; the parties' responses to that order are now before the court. We summarily affirm the district court's dismissal.

I.

The district court dismissed this action as frivolous under Rule 11 of the Federal Rules of Civil Procedure. It cited two cases, Rhinehard v. Stauffer, 638 F.2d 1169 (9th Cir. 1979), and Brown v. District Unemployment Board, 411 F. Supp. 1001 (D.D.C. 1975). These cases, however, were decided before Rule 11 was revised in 1983. Prior to the revision, Rule 11 stated: "If a pleading

is not signed, or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served." See 2A Moore's Federal Practice and Procedure paragraph 11.01[3] (1987). That provision was deleted in the 1983. The Advisory Committee Notes explain:

> The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56.

(Citations omitted.) Under Rule 11, as amended in 1983, dismissal of a complaint as frivolous is not appropriate. Therefore the district court erred in relying on Rule 11.

II.

"It is clear, though, that we may affirm a district court on grounds other than those upon which it relied." United States International Trade Commission v. Tenneco West, 822 F.2d 73, 80 (D.C. Cir. 1987). In

this case the district court should have granted the motion to dismiss on the ground that Cooper failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, all Cooper's claims are without merit.

A.

In Courts I, II and II of his complaint, Cooper alleges that the defendants committed fraud by conspiring to withhold information about his offer for RCA stock in violation of Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. Sec. 78n(e) (1982). See Complaint at paragraphs 90-118.

Section 14(e) was enacted in 1968 as part of the Williams Act and is a general proscription against fraud in connection with tender offers. See Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 22-24 (1977). This section applies only when a tender offer has been made. See Lewis v. McGraw, 619 F.2d 192, 195-96 (2d Cir.), cert. denied, 449 U.S. 951 (1980); Voisin v. Bartell Media Corp.,

[1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) paragraph 98, 486, at 92,845-46 (S.D.N.Y. 1982). Congress, however, intentionally did not define the term "tender offer." See Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 56 (2d Cir. 1985).

Cooper's complaint and affidavit filed in district court make clear that Cooper never made a tender offer. His various letters refer only to prospective plans for "offers" that were never carried out. See, e.g., Complaint at paragraphs 33-35 (September 16, 1985 letter from Cooper to various defendants "to advise that the Proprietorship and the Charity have joined forces and are preparing to make an offer to purchase ... equity directly from ... shareholders."). Cooper does not allege that he ever made an offer to purchase RCA shares to the public generally or to any RCA shareholder. Because there was not solicitation, Cooper failed to state a claim under section 14(e).

B.

In Court IV of his complaint, Cooper claims that Dow Jones violated the Robinson-Patman Act, 15 U.S.C. Sec. 13 (1982), by refusing to sell advertising space to him. See Complaint at paragraphs 119-29. The Act provides:

> It shall be unlawful ... to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition.

15 U.S.C. Sec. 13(a) (1982) (emphasis added). Newspaper advertising, however, is not considered a commodity for purposes of the Act. See Ambook Enterprises v. Time, Inc., 612 F.2d 604, 609 (2d Cir. 1979), cert. denied, 448 U.S. 914 (1980); National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 84-86 (D.D.C. 1977), aff'd mem., 595 F.2d 888 (D.C. Cir. 1979). Therefore, Cooper has plainly failed to state a Robinson-Patman Act claim.

C.

In Count IV of his complaint, Cooper claims that Dow Jones and several of its officers and employees violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. Sec. 1 (1982), by conspiring among themselves to refuse to sell advertising space to Cooper. See Complaint at paragraphs 119-29. That claim, however, does not constitute a violation of section 1 of the Sherman Act. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) ("officers or employees of the same firm do not provide the plurality of actors imperative for a Sec. 1 conspiracy."

Cooper also alleges that GE and RCA conspired with Dow Jones to refuse to sell advertising space to him and thereby restrain trade in RCA stock. See Complaint at paragraph 121. Cooper alleged that he suffered a loss in excess of $78,750,000 because he has been forced to forego his planned purchase of RCA stock. See Complaint at paragraph 135.

He also alleged that he suffered a loss of $15,750,000 by reason of the RCA-GE merger. See id. These damage claims are frivolous in light of the fact that Dow Jones' refusal to publish Cooper's advertisement did not prevent him from otherwise purchasing RCA stock. Cooper's complaint therefore fails to allege that he suffered any injury to his trade or business cognizable under the antitrust laws. See Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).

Text of U.S. Court of Appeals Order, CA No. 86-7005, November 10, 1987

O R D E R

Upon consideration of appellant's petitioner for rehearing, it is ORDERED, by the Court, that the petition is denied.

Complaint Extracts

8. Upon information and belief, defendant Dow Jones & Company, Inc., is a corporation organized under the laws of the State of Delaware and authorized to do business under the laws of the District of Columbia and the State of New York and others, and has its principal place of business at 22 Cortlandt Street, New York, New York 10007 and others at 1025 Connecticut Avenue, N.W., Washington, D.C. Defendant Dow Jones & Company, Inc. ("Dow Jones") is the owner of the Wall Street Journal, a national and international newspaper, in which offers to purchase, tender offers and invitations to tender are routinely advertised to reach the most shareholders with news of offers on the basis of equal timeliness. It is alleged that defendant Dow Jones conspired with one or more of the defendants or others to violate the Securities Act (Sec. 14(e)), the Sherman

Act (Sec. 1) and the Robinson-Patman Anti-Discrimination Act (Sec. 13(e)) as alleged herein and against whom a declaratory judgment and treble damages are sought by the plaintiff.

54. The plaintiff made it clear however that subsequent to the December 2, 1985 date he would be publishing the offers to purchase and advising shareholders of his efforts with management in the WSJ (for starters), with or without benefit of their interaction.

55. November 25, 1985. About this time, the plaintiff inquired of the WSJ as to what was holding up the clearance for the charitable discount for the full page advertisements designed to announce the offers to purchase made to the target companies' managements. Wooten of the Washington office of defendant WSJ advised the plaintiff that the charitable discount request had been denied by the New York brass and that he had no reasons to tell the plaintiff except that defendant Cummings of

the national staff was expecting to get a call from the plaintiff.

62. The plaintiff then advised defendants Welch (of GE) and Frederick (of RCA) of his decision to approach certain sophisticated shareholders having already begun to seek them out. The plaintiff in his notice to the defendants (dated November 29, 1985) reserved the option to proceed publicly with the advertisements (in the event he was proven incorrect about the WSJ's motives). The correspondence was designed to have the effect of putting defendants Welch, Frederick and Rohatyn on notice that the plaintiff had not been stopped by the WSJ's illegal behavior if that is what was expected. Instead, the November 29, 1985 letter was designed to give the impression to the Defendants that in due course RCA and GE shareholders would be finding out about the superior offers in spite of all attempts, legal or obviously otherwise, to keep word of the offering terms and conditions out of the

public eye.

63. December 4, 1985. About this time the plaintiff began to dig for evidence that the WSJ had been in contact with some or all of the relevant companies, supplied them confidential financial and other information about the plaintiff, and had agreed to never sell him the advertising space he desired. The plaintiff contends that in a trial on the merits, discovery will show conclusively that the contacts between the parties in fact did take place and that the WSJ deliberately conspired to keep the plaintiff's relevant invitation to tender -- material information concerning the offers to purchase -- away from RCA, GE and other stockholders. In order for the plaintiff to confirm his theory, he placed a call to the General Counsel, Mr. Skinner, of Dow Jones, the party most familiar with the original offer from the plaintiff to purchase Dow Jones. Defendant Skinner did not return the plaintiff's telephone calls but Mr. David E. Moran

of Dow Jones (in-house counsel's office) did.

73. The Tender Offer. The plaintiff on November 21, 1985 submitted to RCA management (defendant Frederick) an offer to purchase to wit the following:

74. Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Formal Offer to Purchase, at $66.17 Face Amount Each, 4.999%, or 4,484,103 Shares, of RCA Corporation Common Stock (Whichever Is Less); Subject Only to a Negotiated Acquisition Pact and/or to the Tender to the Offer By Holders of a Controlling Interest, 80%, or 71,760,000 Common Shares (Whichever Is Less).

75. This formal offer will add to my claim of good faith that every effort was made to illustrate (1) just why and how the consent and/or approval of shareholders representing a controlling interest of RCA common is sought, (2) for senior management/directors the fact that the Project 76 -

AAA, Inc. securities exchanged in part for RCA common are exempt from SEC registration requirements, and (3) that our intention has always been to conduct and promote the offer to purchase in compliance with all SEC 14-d regulations, notwithstanding the fact of our legal exemption from same based on the limited percentage of total common shares outstanding (4.999%) sought in the original offer to purchase.

76. While senior management/directors are not required to issue 14-d(9) or 14-e(2) statements until this offer has been published, let me say that it would be a reasonable exercise of fiduciary duty to issue a voluntary 14-e(2) and/or 14-d(9), Position of Subject Company and/or Solicitation/Recommendation statement in connection with this offer.

77. The offer to purchase provides $66.17 (including 1995 upgrade) in face amount, marketable, asset-backed securities with a combined "effective" taxable cash

coupon of $6.50 and a renewable minimum $21.51 Treasury-recognized, year-of-acquisition, tax deduction per share (see attached chart) as per the following:

(a) A 30-year, $20.00 face valued Project 76 - An American Affair Inc. asset-backed debt security* with a "staggered coupon" and its principal guaranteed (non-callable, negotiable) per share pro rated;

(b) One minimum $21.51 year-of-acquisition (1985 tax year) marketable asset-backed tax deduction (per share) subject to "non-cash" option (c) below. (The deduction is exempt from all proposed minimum taxes, but for a shareholder to qualify for the $21.51 tax benefit, he is required to list the distribution to the charity in his name as income) (see chart);

(c) A nominal payment of $2.50 cash or an option exchangeable for one $46.17 face amount (including 1995 upgrade when dedicated) "New RCA" debt security which is negotiable, asset backed and non-callable and

which includes at each point of maturity a new minimum $21.51 charitable tax deduction renewable every tenth year thereafter, backed by post-acquisition "New RCA" assets;

(d) Subject to 80%, controlling interest, or 71,760,000 shares being tendered (whichever is less), pro ration will apply. However, this Offer to Purchase will then be amended and revised to become an offer to purchase a minimum controlling interest of all RCA shares outstanding (i.e., Schedule 14d-1 filing with the SEC).

78. The plaintiff submitted to the defendant Frederick of RCA the following chart to outline on a face amount only (not value) basis what could be associated with the offer in an environment where a 30-year Treasury bond was competitively priced to yield 9.8225%.

RCA Corporation
OFFER TO PURCHASE
CHART

CURRENT COMMON STOCK DIVIDEND.....	$1.04
AS A PERCENT OF CURRENT NYSE PER SHARE MARKET VALUE*.....	2.3%
TENDER OFFER DEBT COUPON.....	**$3.25**
AS A PERCENT OF CURRENT STOCK DIVIDEND (YEARS 1-5, 11-15 & 21-25 ONLY).....	312.5%
AS A PERCENT OF PER SHARE MARKET VALUE (YEARS 1-5, 11-15 & 21-25 ONLY).....	7.18%
TENDER OFFER DEBT COUPON EFFECTIVE YIELD.....	**$6.50**
AS A PERCENT OF PER SHARE CURRENT COMMON STOCK DIVIDEND.....	625%
AS A PERCENT OF PRINCIPAL FACE AMOUNT REDEMPTION VALUES.....	9.82%
AS A PERCENT OF COMMON STOCK "NYSE" CURRENT SHARE PRICE.....	**146.2%**

83. The plaintiff further states that the offer is exempt from the SEC filing requirement under 14(d)-1, 15 U.S.C. Sec. 78n(d), because the plaintiff in his November 21, 1985 formal offer requested tenders from no more than 4.999% of the total outstanding and reserved the option and accepted a requirement, if shareholders desired (through tender of 80% or more), to make a 14(d)-1

filing (afterward only) making the offering terms and conditions available to all RCA shareholders.

86. The defendants knew or had every reason to know that an offer that represented a significant minimum value premium of $2,844,900,000 (up to $6,051,609,000) over the market price of $45.25 (September 16, 1985) and significantly ($16.89 to $52.52 per share) in excess of the GE offering price was material information and that for management and directors to withhold this information or as the defendant WSJ did, to block publication of the offer in consultation with the defendants RCA and GE and/or other shareholder managements was a clear violation of the spirit, intent and consequences of Section 14 of the Securities Exchange Act of 1934, and 15 U.S.C. Secs. 1 and 13(e) (anti-trust laws) 1982.

94. The plaintiff alleges that the motive of the agreement was to intentionally conceal the true intent of the defendants to

deceive, manipulate and in effect defraud RCA shareholders and to deny, in violation of the Securities Exchange Act of 1934, the plaintiff an opportunity to purchase RCA shares. The objective of the misrepresentation (material non-disclosure) on the face of it constitutes an attempt to deceive and to conceal material information from RCA shareholders.

106. The intent of the agreement among defendants was this material omission and it was to deceive and manipulate the ultimate decision of shareholders and Board members to sell shares or recommend the sale of securities. When the Board was advised by management that the plaintiff's offer had been received along with a management request that Lazard Freres & Company would not stand independently on their fairness opinion without indemnification, it should have demanded to know why and was at best grossly negligent to do otherwise.

120. The plaintiff believes agreement was reached to constrain the Plaintiff's right to purchase and RCA shareholders right to sell securities (trade) in violation of the Sherman Act, and the Robinson-Patman Act, and that the defendants Dow Jones, & Company, Inc.; Warren H. Phillips, Dow Jones Chairman & Chief Executive Officer; Peter G. Skinner, Dow Jones Vice President, Corporate Secretary and General Counsel; David E. Moran, Dow Jones Counsel; William Cummings, Dow Jones National advertising Director for the Wall Street Journal intentionally and deliberately (conspired) agreed to restrain (substantial and unreasonable restraint) (blocked) the plaintiff's access to the defendant WSJ's advertising facilities on equal footing with other offer to purchase advertisers (effectively preventing RCA and other target shareholders from receiving material information and causing as of this filing $78,750,000 in damages to the plaintiff and a greater amount of injury to the public) in

violation of the securities and antitrust laws in the following manner.

121. The plaintiff believes that the defendants above did agree to implement a scheme to block said access and accordingly with each of the following points is in violation of securities laws Sec. 14(e) and anti-trust laws Sections 1 and 13(e).

122. The above agreed to prevent the publication of the plaintiff's offer by refusing to sell any advertising space in the WSJ to the plaintiff in consultation with the management of GE and RCA and/or other target companies and/or competitors. The defendants' action was designed to interfere (restraining trade in securities, injure the public, conspire to and substantially and unreasonably restrain trade) with the purchase of RCA and other securities by the plaintiff and with the sale of said securities by RCA and other shareholders.

125. Therefore, the defendants' actions were intended to deceive RCA and other

shareholders of public companies for the purpose of willfully deceiving, manipulating and defrauding shareholders and to do so by limiting the number and types of purchasers that could advertise offers to purchase in the publication. The defendant would only publish the plaintiff's offers if and when the plaintiff got the permission of managements (RCA and others), as stated to the plaintiff by the defendant Cummings and Moran in violation of equal access and in effect restrain his right to trade and excluding him from the principal business of contesting corporate control and other matters.

128. The defendants above did agree (conspire) to implement a scheme to block (restrain trade substantially and unreasonably with due intent to injure the public) said access and accordingly are in violation of the Williams Act, the Sherman Act and the Robinson-Patman Anti-Discrimination Act.

129. Prevention of the publication of the plaintiff's offer by refusing to sell ad space to the plaintiff in consultation with managements of GE and RCA and others, is an action designed to interfere with the purchase of RCA securities by the plaintiff and with the sale of securities by RCA shareholders.

134. The fact that material information was deliberately withheld from the official proxy filed with the Securities and Exchange Commission suggests a violation and an attempt to defraud the RCA shareholders and was the result of the defendants' actions from whom damages are sought. The fact that the restraint of trade was deliberate, the result of conspiracy, substantial and unreasonable, and with the intent to do injury to the public, also suggest that a violation and an attempt to restrain trade was the result of the Count IV defendants' actions.

135. By reason of the practices and

restraints heretofore alleged the plaintiff has been damaged in its business in the following respects:

(a) It has been forced to forego RCA and/or other shareholder fundraising for the public charity and the purchase of RCA and/or others for himself and the charity, whereby plaintiff has suffered a loss in excess of $78,750,000.00.

[Mobil Corporation letterhead, 150 East 42nd Street, New York, New York 10017]

April 8, 1985

Dear Mr. Cooper:

My associates and I have carefully considered the materials you have made available for us, and I have reported them on our telephone conversations.

....Your approach will succeed if, but only if, the anticipated interest payments on the bonds to be issued would have a fair value at or approaching their aggregate stated value, discounted, of course, for the time value of money. This quite clearly can be the case only if, as you suggest, those payments are backed by Mobil's assets. This would be done by increasing the leverage position of Mobil, i.e., increasing its indebtedness in relation to its equity and, in effect, distributing the increase to the equity holders....

Thank you for your interest in Mobil, and for sharing this imaginative concept with us.

Sincerely yours,

Louis Hering

October 1, 1985

Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Acquisition of RCA Corporation

Dear Mr. Frederick:

As per my letter to you of September 16, 1985.

I am writing to advise that my letter to you regarding the proposed acquisition of RCA Corporation ... was ... a studied notification of interest on the Proprietorship's part to undertake an "Offer to Purchase" the RCA Corporation....

Accordingly, the confidential "Offer to Purchase" will be forwarded to your attention.

Please stand by.

Sincerely,

November 21, 1985

Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Formal Offer to Purchase, at $66.17 Each, 4.999%, or 4,484,103 Shares, of RCA Corporation Common Stock (Whichever Is Less); Subject Only to a Negotiated Acquisition Pact and/or to the Tender to the Offer By Holders of a Controlling Interest, 80%, or 71,760,000 Common Shares (Whichever Is Less).

Dear Mr. Frederick:

Not that one could fault your company's strategy, but I am writing as promised to continue (for the record) the pre-offer consultation process begun with my letters of September 16, and October 1, 1985 and to advise, among other things, that we have reconsidered and decided against making an offer to acquire all of RCA Corporation's

("RCA") common stock. Our new course of action may, however, result in a revision of this offer and the ultimate acquisition of RCA via a 14d-1 tender offer filing with the Securities and Exchange Commission.

While there was little surprise here when management rejected outright the prospect of corporate reorganization, you will be required (SEC rules), once the offer is duly published, to respond in writing to each and every shareholder with regard to this offer to purchase.

I can accept a degree of responsible skepticism or even a self-survival reaction from management rooted in a desire for autonomy (i.e., continued diverse share ownership), but you may be assured that in a direct and inexpensive manner I will face down any and all challenges (legal, accounting, tax and financial) to the concept's viability, notwithstanding that management will no doubt expend shareholder financial resources on acquisition expertise of

questionable value.

If management proceeds along this line, only the sophisticated investor (followers of financial media) and arbitraguer will benefit from the imminent and initial publication of the offer. Others, deprived of management's views, could end up selling into the open market too early or too late should a tender offer for controlling interest result and a corollary no-common-dividend, post-acquisition policy be instituted. (And those aspects of a successful offer which may have been expected to affect shareholders financially should have been of paramount fiduciary responsibility.)

Management might consider that after the fact any shareholder could say that it was incumbent upon management to insure, where possible, that the purported value of my proposal (or any proposal) to the stockholders had a realistic basis, to insure that an orderly fair market was maintained in the Company's common stock within the framework

of federal and state laws and the rules of the New York Stock Exchange, and to have assumed that any release of information to the public over which the Company could have executed some control was fully supported by facts.

Hence, this correspondence will add to my claim of good faith that every effort was made to illustrate (1) just why and how the consent and/or approval of shareholders representing a controlling interest of RCA common is sought, (2) for senior management/ directors the fact that the Project 76 - AAA, Inc. securities exchanged in part for RCA common are exempt from SEC registration requirements, and (3) that our intention has always been to conduct and promote the offer to purchase in compliance with all SEC 14-d regulations, notwithstanding the fact of our legal exemption from same based on the limited percentage of total common shares outstanding (4.999%) sought in the original offer to purchase.

Today, however, while senior management/directors are not required to issue 14-d(9) or 14-e(2) statements until this offer has been published, let me say that it would be a reasonable exercise of fiduciary duty to issue a voluntary 14-e(2) and/or 14-d(9), Position of Subject Company and/or Solicitation/ Recommendation statement in connection with this offer.

OFFER TO PURCHASE

The offer to purchase provides $66.17 (including 1995 upgrade) in face valued, marketable, asset-backed securities with a combined "effective" taxable cash coupon of $6.50 and a renewable minimum $21.51 Treasury-recognized, year-of-acquisition, tax deduction per share (see attached chart) as per the following:

(A) A 30-year, $20.00 face valued Project 76 - An American Affair Inc. asset-backed debt security* with a "staggered coupon" and its principal guaranteed (non-callable, negotiable) per share pro rated;

(B) One minimum $21.51 year-of-acquisition (1985 tax year) marketable asset-backed tax deduction (per share) subject to "non-cash" option (C) below. (The deduction is exempt from all proposed minimum taxes, but for a shareholder to qualify for the $21.51 tax benefit, he is required to list the distribution to the charity in his name as income) (see chart);

(C) A nominal payment of $2.50 cash or an option exchangeable for one $46.17 face valued (including 1995 upgrade when dedicated) "New RCA" debt security which is negotiable, asset backed and non-callable and which includes at each point of maturity a new minimum $21.51 charitable tax deduction renewable every tenth year thereafter, backed by post-acquisition "New RCA" assets;

(D) Subject to 80%, controlling interest, or 71,760,000 shares being tendered (whichever is less), pro ration will apply. However, this Offer to Purchase will then be amended and revised to become an offer to

purchase a minimum controlling interest of all RCA shares outstanding (i.e., Schedule 14d-1 filing with the SEC).

THIS OFFER TO PURCHASE IS ALSO SUBJECT TO:

(1) Voluntary Securities and Exchange Commission registration of Project 76's debt securities.

*NOTE: SEC rules and regulations provide that not-for-profit debt instruments (bonds) may be publicly offered and sold without compliance with the 1933 Act registration provisions or the applicable provisions of the 1934 Act or the Trust Indenture Act of 1939, i.e., the proposed securities constitute exempt securities pursuant to sections 3(a)(2) and (4), 3(a)(12), and 304(a)(4) of those Acts, respectively.

(2) This offer to purchase being published or otherwise initiated by the bidder on or before December 2, 1985.

Please advise in writing (in advance of December 2, 1985) if questions regarding this offer to purchase exist.

Sincerely,

P.S.: This offer to purchase 4.999% is void where prohibited by law pending publication.

Enclosure:
Offer to Purchase Chart
LNC/ch

RCA Corporation
OFFER TO PURCHASE
CHART

COMPANY STOCK SYMBOL[1].....RCA
CURRENT COMMON STOCK DIVIDEND.....$1.04
AS A PERCENT OF CURRENT
NYSE PER SHARE MARKET VALUE.....2.3%
TENDER OFFER DEBT COUPON.....$3.25
AS A PERCENT OF CURRENT STOCK DIVIDEND
(YEARS 1-5, 11-15 & 21-25 ONLY).....312.5%
AS A PERCENT OF PER SHARE MARKET VALUE
(YEARS 1-5, 11-15 & 21-25 ONLY).....7.18%
TENDER OFFER DEBT COUPON EFFECTIVE
YIELD.....$6.50
AS A PERCENT OF PER SHARE
CURRENT COMMON STOCK DIVIDEND.....625%
AS A PERCENT OF PRINCIPAL
FACE AMOUNT REDEMPTION VALUES.....9.82%
AVAILABLE TAX DEDUCTIONS.....$4.30
AS A PERCENT OF DEBT COUPON
(YEARS 1-5, 11-15 & 21-25 ONLY).....132%
TOTAL TAX LIABILITY.....$1.75
AS A PERCENT OF PHILANTHROPY[2]
(YEARS 6-10, 16-20 & 26-30 ONLY).....50%
DEBT ISSUES FACE AMOUNT MARKET VALUE[3]..$66.17
AS A PERCENT OF DEBT ISSUES'
PRINCIPAL REDEMPTION VALUE.....100%
AS A PERCENT OF COMMON STOCK
"NYSE" CURRENT SHARE PRICE.....146.2%
NUMBER OF SHARES TO PURCHASE
(IN MILLIONS).....4.5

AS A PERCENT OF TOTAL
COMMON SHARES OUTSTANDING..... 4.999%
CURRENT SHARE PRICE USED FOR
CALCULATIONS.....$45.25

1 SEE CORPORATE LIST FOR FULL COMPANY NAME AND OTHER COMPANY INFORMATION.

2 PROJECT 76 - AN AMERICAN AFFAIR, INC. (EXCLUSIVE CHARITABLE BENEFICIARY).

3 DEBT MARKET VALUE EQUALS THE FACE AMOUNT MULTIPLIED BY .098225 (A 9.8225% "EFFECTIVE"[5] COUPON RATE).

4 OR 4.999%, WHICHEVER IS LESS.

5 EFFECTIVE TAXABLE PAYOUT RATE EQUALS 9.8225% OF THE DEBT PACKAGES' PRINCIPAL (FACE AMOUNT) REDEMPTION VALUE, TIMES 10 YRS. (ONE THIRD THE LENGTH OF MATURITY), DIVIDED BY 5, TIMES 50% (50% TAX BRACKET), PAYABLE IN EQUAL AMOUNTS IN YEARS 1-5, 11-15 AND 21-25.

November 29, 1985

Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Initiation of Acquisition of RCA Equity

Dear Mr. Frederick:

The shareholder tax year has passed for all intents and purposes and you are no doubt fully aware that the Proprietorship has commenced an initiative in which it ... is attempting to negotiate the pre-offer purchase of RCA Corporation ("RCA") common directly and/or to commit certain owners to the tender of their RCA shares prior to the announcement of identical (offer to purchase) terms and conditions to the general public.

....In any event, you may expect to receive from us additional details on the day the offer to purchase is published.

Sincerely,

[Bank of America letterhead, H. Helmut Loring, Senior Vice President, Assistant General Counsel, San Francisco Headquarters]

November 5, 1985

Dear Mr. Cooper:

Mr. Armacost discussed your proposal to acquire BankAmerica Corporation stock briefly with the Corporation's Board of Directors at its meeting of November 4 and I have been instructed to advise you that BankAmerica Corporation has no interest in pursuing your proposal.

Sincerely,

H. Helmut Loring
Senior Vice President and
Assistant General Counsel

(1) U.S. Constitution, 14th Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) U.S. Constitution, 7th Amendment.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S.C. Sec. 28, 1651(a) and (b).

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Federal Rules of Civil Procedure, 12(b)(6), 41(b), 52(a) and 56(e):

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ....(6) failure to state a claim upon which relief can be granted,....A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim

upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The

court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 52. Findings by the Court

(a) Effect.... Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(a) Effect. [Effective on August 1, 1985. See, also, subdivision (a) above.] In all actions tried upon the facts without a

jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

FIndings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 56. Summary Judgment.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his

pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Supreme Court Rules

Rule 26. Considerations governing issuance of extraordinary writs.

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. Sec. 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provisions, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Rule 27. Procedure in seeking an extraordinary writ.

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. Secs. 1651(a), 2241, or 2254(a), shall comply in all respects with

Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3(b) of this Rule), are filed with the Clerk and the docket fee is paid.

.2. (a) If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and

such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

"Appellate Jurisdiction." Black's Law Dictionary. West Publishing Company, 5th Ed.

Appellate jurisdiction. The power vested in an appellate court to review and revise the judicial action of an inferior court, evidenced by an appealable order or an appealable judgment rendered by such a court. Trengen v. Mongeon, N.D., 200 N.W.2d 50, 53. The power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages (i.e., original jurisdiction) but only after it has been finally decided by an inferior court, i.e., the power of review and determination on appeal, writ of error, certiorari, or other similar process. Jurisdiction on appeal; jurisdiction to revise or correct the proceedings in a cause already instituted and acted upon by an inferior court, or by a tribunal having the attributes of a court. Limits of appellate jurisdiction are governed by statutes (e.g. 28 U.S.C.A. Sec. 1291 et seq.) or constitutions.

District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (1984):

4. Federal Civil Procedure, 1772

Before a complaint may be dismissed for failure to state a claim, trial court must determine that allegations do not support relief on any possible theory.

5. Federal Civil Procedure, 1829

For purposes of a motion to dismiss, a complaint is to be construed liberally in favor of plaintiff.

6. Federal Civil Procedure, 1773

Complaint should not be dismissed for failure to state a claim unless it appears that plaintiff could prove no facts in support of his claim which would entitle him to relief.

Doe v. United States Department of Justice, 753 F.2d 1092 (1985):

5. Federal Civil Procedure, 1829, 1835

For purposes of motion to dismiss for failure to state a claim, factual allegations of complaint must be taken as true, and any ambiguities or doubts concerning sufficiency of the claim must be resolved in favor of pleader.

6. Federal Civil Procedure, 1773

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief.

9. Federal Civil Procedure, 1775

A district court should not grant a motion to dismiss for failure to state a claim for failure to seek technically appropriate remedy when availability of some relief is readily apparent on face of complaint. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

Humana, Inc. v. American Medicorp, Inc., 445 F. Supp. 613 (1977):

2. Securities Regulation, 174

Test by which tender offeror's right to sue for injunctive relief under the Williams Act must be determined is whether stockholders of the target company would be benefited if allegations of the complaint are proven to be true and relief requested is granted. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

3. Securities Regulation, 174

Where thrust of tender offeror's complaint against competing tender offeror was to request increased disclosure of the terms of the latter's offer and the character of its management so that target stockholders could more intelligently choose between the competing offers, tender offeror had standing to sue for injunctive relief under the Williams Act. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

Lewis v. McGraw, 619 F.2d 192 (1980):

1. Securities Regulation, 105

Where no tender offer had ever been made to shareholders of target corporation, shareholders could not maintain cause of action for damages under Williams Act. Securities Exchange Act of 1934, Sec. 14(e) as amended 15 U.S.C.A. Sec. 78n(e).

PER CURIAM:

[1] The instant action is a consolidation of five similar lawsuits brought on behalf of McGraw-Hill, Inc. stockholders, alleging that McGraw-Hill and its directors made false statements of material facts in response to two proposals of the American Express Company for the acquisition of substantial amounts of McGraw-Hill stock. The issue before us is whether shareholders may maintain a cause of action for damages under the Williams Act, 15 USC Sec. 78n(e), where they concede that no tender offer has been made to them. We conclude that they may not.

Piper v. Chris-Craft Industries, 430 U.S. 25 (1977):

A

Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously. Department of Air Force v. Rose, 425 U.S. 352, 388-389 (1976) (BLACKMUN, J., dissenting); United States v. Public Utilities Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring); Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942). In this case both sides press legislative history on the Court not so much to explain the meaning of the language of a statute as to explain the absence of any express provision for a pri- vate cause of action for damages. As Mr. Justice Frankfurter reminded us: "We must be wary against interpolating our notions of policy in the interstices of legislative provisions." Ibid. With that caveat, we turn

to the legislative history of the William Act.

In introducing the legislation on the Senate floor, the sponsor, Senator Williams, stated:

"This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967). (Emphasis supplied.)

The same theme of investor protection was emphasized eight months later by Senator Williams on the day the measure was passed by the Senate:

"[The federal securities laws] provide protection for millions of American investors by requiring full disclosure of information in connection with the public offering and trading of securities. These laws have worked well in providing the public with adequate information on which to base intelligent investment decisions.

* * * * *

"There are, however, some areas still remaining where full disclosure is necessary for investor protection but not required by present law. One such area is the purchase by direct acquisition or by tender offers of substantial blocks of the securities of publicly held companies.

> "S.510 ... provides for investor protection in these areas." Id., at 24664. (Emphasis supplied.)

Indeed, the bill as finally enacted by Congress was styled as a disclosure provision: "A bill to provide for full disclosure of corporate equity ownership of securities under the Securities Exchange Ac of 1934." See generally 1 A. Bromberg supra, Sec. 6.3(121), at 116.2.

Confirming the view that the legislation was designed to fill "a rather large gap in the securities statutes," Manuel Cohen, then Chairman of the SEC, testified before the Senate Subcommittee on Securities:

> "[T]he general approach ... of this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts...." Senate Hearings 15.

In response to the suggestion that the legislation would tend to aid entrenched management in warding off potentially beneficial takeover bids, Chairman Cohen testified:

> "But the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a

> pawn in a form of industrial warfare.... The investor is lost somewhere in the shuffle. This is our concern and our only concern." Id., at 178. (Emphasis supplied.)

The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies....

Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (1984):

1. Federal Civil Procedure, 1773

Dismissal for failure to state claim for relief is proper only when it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

2. Federal Civil Procedure, 1829

On motion to dismiss for failure to state claim for relief, all factual doubts must be resolved and all inferences made in favor of plaintiffs. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

3. Federal Civil Procedure, 1835

On motion to dismiss for failure to state claim for relief, defendant's factual allegations, if in agreement with plaintiff's, only reinforce plaintiff's case; if in disagreement, they must be ignored. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355 (1979):

2. Securities Regulation, 52

Test of materiality under Securities Exchange Act section requiring disclosure and proscribing false or misleading statements in tender offer is that misstatement or omission is material if there is substantial likelihood that reasonable shareholder would consider it important in deciding whether to accept tender offer. Securities Exchange Act of 1934, Secs. 10(b), 14(e), 15 U.S.C.A. Secs. 78j(b), 78n(e).

Securities and Exchange Commission v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (1985):

3. Securities Regulation, 52

Existence of tender offer is determined by examining the following factors: active and widespread solicitation of public shareholders for shares of issuer; solicitation made for substantial percentage of issuer's stock; offer to purchase made at premium over prevailing market price; terms of offer are form rather than negotiable; offer contingent on tender of fixed number of shares, often subject to fixed maximum number to be purchased; offer is open only for limited period of time; offeree is subjected to pressure to sell his stock; and public announcements of purchasing program concerning target company precede or accompany rapid accumulation of large amount of target company's securities. Securities Exchange

Act of 1934, Sec. 13(e), as amended, 15 U.S.C.A. Sec. 78n(e).

5. Securities Regulation, 52

For purposes of determining whether issuer repurchases during tender offer constitute a tender offer, premium is determined not by reference to pretender offer price but rather by reference to market price.

Voisin v. Bartell Media Corp., [1981-82 Transfer Binder], Para. 98,486, CCH Fed. Sec. L. Rep. 92,839 (S.D.N.Y. 1982):

At the time the August 20, 1976 and January 12, 1977 notices were sent to the shareholders, Downe already had acquired 66% of the Bartell stock and therefore was not in the process of seeking to obtain control of the company: It already had control. The August statement informed the minority shareholders of the fact that, on June 15, 1976, the boards of Bartell and Downe had approved the merger and that, pursuant to Delaware law, the shares of the minority stockholders were cancelled as of September 20, 1976, the effective date of the merger. The notice of January 1977 was essentially the same.

Under the circumstances presented by this case, no tender offer was made. The salient characteristics of a tender offer, not found here, include: 1) contingency of

the offer to purchase stock on the acquisition of a minimum number of shares; 2) specific, limited period of time in which the offer remains open; 3) payment of a premium price in order to solicit shares. In the case at bar, the offer was made in connection with a forced statutory merger by a majority shareholder. The notices stated that defendants would buy the minority's stock, but the offer was not contingent with respect to volume or time. Furthermore, defendants offered what they stated as a fair market price--not a premium price.

For these reasons, the Court holds that the plaintiff has not stated a cause of action under Section 14(e). Defendants motion to dismiss is therefore granted as to that provision.

Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp. 468 (1978):

1. Securities Regulation, 174, 178

Tender offeror had standing under Williams Act to seek preliminary and final injunctive relief against allegedly false and misleading statements made by target company's management. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

2. Securities Regulation, 52

In context of a tender offer, omission of a fact which makes a statement concerning value of target company's shares misleading is material, for value of stock is likely to be an important consideration to shareholder. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

UNITED STATES SUPREME COURT

IN RE: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER THE PROPRIETORSHIP

Civil Action No. _____

AFFIDAVIT OF SERVICE

I hereby certify that petitioner's Writ Application and Petitioner of February 8, 1988 and Appendix were sent on February 8, 1988 by first class mail service to the following:

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Circuit Judge Abner J. Mikva
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DISTRICT OF COLUMBIA) ss

I, _____, a Notary Public in and for the District of Columbia, do hereby certify that on this 8th day of February, 1988, personally appeared before me, the said L. Napoleon Cooper, who executed this Affidavit of Service and acknowledged the same to be his act and deed.

Given under my hand and seal this 8th day of February, 1988.

_____
Notary Public

My commission expires: _____

Supreme Court, U.S.
FILED
MAR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In Re: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER the Proprietorship

**On Writ of Mandamus and Prohibition
in the Alternative to the
United States Court of Appeals
for the District of Columbia Circuit**

OPPOSITION TO PETITION FOR WRIT TO ISSUE

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Question Presented

Whether in summarily affirming dismissal of this action, the United States Court of Appeals for the District of Columbia Circuit exceeded its jurisdiction.

List of Parties Required by Supreme Court Rule 28.1

Dow Jones & Company, Inc., *The Wall Street Journal*, Peter G. Skinner, William Cummings and David E. Moran (hereinafter Dow Jones) hereby state that:

a. Dow Jones & Company, Inc. is the exclusive owner and publisher of *The Wall Street Journal.*

b. Dow Jones & Company, Inc. does not have a parent company, subsidiaries or affiliates.

c. Dow Jones & Company Inc., is a minority shareholder in Telerate, Inc., One World Trade Center, New York, New York.

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Reference to Opinions and Judgments Delivered by the Courts Below

Reference is made to the Order and Memorandum of the United States District Court for the District of Columbia dated July 29, 1986. Relying on Rule 11, the District Court dismissed this action as frivolous. Petitioner's Appendix (Pet. App.) 5, 6-8.

Reference is also made to the *Per curiam* Order of the United States Court of Appeals for the District of Columbia Circuit dated July 30, 1987 In pertinent part, the Court of Appeals (Starr, J., Silberman, J. and McGowan, S.J.) ordered all parties to show cause why the District Court's judgment should not be affirmed. Pet. App. 9.

Reference is also made to the *Per curiam* Order and Memorandum of the United States Court of Appeals for the District of Columbia Circuit dated October 9, 1987. The Court of Appeals, (Wald, C.J., Mikva, J. and Edwards, J.) summarily affirmed the District Court, but on different grounds. The Court of Appeals found that petitioner had failed to state a cause of action upon which relief could be granted. Pet. App. 12, 13-20.

Statement of Jurisdiction

The judgment of the United States District Court for the District of Columbia was filed on July 29, 1986, dismissing petitioner's complaint. The United States Court of Appeals for the District of Columbia summarily affirmed on October 9, 1987. Cooper's petition for rehearing was denied on November 10, 1987. Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1651 (West 1981).

Applicable Statutes and Rules

Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78n(e) (West 1981) provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonable designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (West 1981) provides:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon

terms not accorded to all purchasers on proportionally equal terms."

Section 1 of the Sherman Act, 15 U.S.C. § 1 (West Supp. 1987), provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

28 U.S.C. § 1651 (West 1966) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2106 (West 1982) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropri-

> ate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

28 U.S.C. § 1291 (West 1987) provides:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

Rule 2 of the Federal Rules of Appellate Procedure provides:

> "In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provision of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

Fed. R. Civ. P. 12(b) provides:

> "(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or

third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as on for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Statement of the Case

A. Statement of Proceedings

On February 10, 1986, petitioner L. Napoleon Cooper (hereinafter Cooper) instituted this action for over $78 million in damages and injunctive relief against Dow Jones, General Electric Company (GE), RCA Corporation (RCA), and Lazard Freres & Company (Lazard) alleging violations of Section 14(e) of the Securities and Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78n(e) (West 1981), Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (West Supp. 1987), and Section 2(e) of the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(e) (West 1973). Jurisdiction was asserted pursuant to § 27 of the 1934 Act, § 4 of the Clayton Act, as well as 28 U.S.C. § 1337 (jurisdiction for actions affecting commerce), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1332 (diversity).

With respect to Dow Jones, Cooper requested compensatory and punitive damages under the antitrust and securities counts, declaratory judgment concerning the alleged illegal actions, and an order that any contract between Dow Jones and the remaining appellees be declared void. He made similar claims against GE, RCA and Lazard.

In essence, Cooper charged that the respondents violated § 14(e) of the 1934 Act by conspiring to withhold information about a prospective offer by him to purchase 4.999% of RCA stock from stockholders. Cooper also alleged antitrust violations by Dow Jones in refusing to sell space to him to advertise his purported offer to purchase RCA and twenty-seven other companies simultaneously.

Cooper sought, and was denied, injunctive relief. Thereafter, all respondents moved to dismiss the action as frivolous. Cooper opposed these motions. On July 29, United States District Judge Harold H. Greene granted respondents motions, dismissing the action as frivolous. Pet. App. 5, 6-8.

On August 4, 1986, Cooper appealed this matter to the United States Court of Appeals for the District of Columbia Circuit. Cooper demanded, but did not receive, emergency relief.

On July 30, 1987, the Court of Appeals, acting on its own motion, directed the parties to show cause why the District Court's decision should not be summarily affirmed. Pet. App. 9-10. Cooper, Dow Jones, Gesub, RCA and GE timely responded to the show cause order. Only petitioner Cooper opposed summary affirmance.

On October 9, 1987, the Court of Appeals affirmed the decision of the District Court, but for different reasons. Pet. App. 12, 13-20. The Court of Appeals found that Cooper had failed to state a cause of action upon which relief could be granted. Fed. R. Civ. P. 12 (b) (6).

On October 23, 1987, Cooper petitioned the Court of Appeals for a rehearing. The petition was denied on November 10, 1987. On February 8, 1988, Cooper applied to this Court for a writ of mandamus or, alternatively, prohibition.

B. Statement of Material Facts

L. Napoleon Cooper is an individual citizen of Louisiana trading as Larry N. Cooper the proprietorship. In both capacities, Cooper is promoting a charitable

program identified by him as "Project 76-An American Affair, Inc." (Project 76). Affidavit of L. Napoleon Cooper sworn to February 20, 1986 (hereinafter Cooper Affidavit) ¶ 20.[1] Project 76 is an unfunded charitable entity (Cooper Affidavit, ¶ 6) dedicated to

> implementation [of a] mechanism whereby *America's major for-profit companies would (with shareholder approval)* assume a primary *supplemental* responsibility for the creation of a working relationship with the nation's non-profit sector to [privately] finance and administer the delivery of basic public works, services and social welfare activities (in association with and to the specifications of federal, state and local governments).
> (Emphasis in the original.)

Cooper Affidavit ¶ 20.

During the six years or so preceding the filing of this action, Cooper approached twenty-eight Fortune 500 companies with prospective offers to buy 4.999% of each company. Cooper Affidavit, ¶ 15. Cooper planned to finance his purchases by issuing high-risk, high-yield debt instruments secured by the respective company's equity voluntarily donated by shareholders. *Id.*, ¶ 6. Cooper made no other arrangements for financing his proposed acquisitions. Id., ¶ 7. Dow Jones, RCA, and GE were among the companies Cooper approached seeking donations for his scheme. *See* Pet. App. 41-47.

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[1] For purposes of this proceeding, all the well-pleaded facts alleged in the complaint and the Cooper Affidavit are accepted as true.

Skinner advised Cooper that the owners of Dow Jones were not interested in his proposal. Cooper made no further attempt to acquire Dow Jones shares.

RCA and GE, among others, did not respond to Cooper's initial solicitation and Cooper specifically pressed them for a response. On November 21, 1985, Cooper submitted a prospective "offer to purchase" to RCA for 4.999% of its common stock. The tentative offer price consisted of a $6.50 cash coupon and a renewable $21.51 one-time tax deduction. Pet. App. 27-28. The total face amount of the offer was less than $300 million.[2] Cooper's only means of financing his offer was by charitable donations from RCA stockholders willing to give their equity to his project.[3] Neither GE nor RCA responded to Cooper's offers.

On October 19, 1985, Cooper contacted *The Wall Street Journal* (hereinafter the *Journal*) seeking information concerning purchasing advertising for charitable activities. By letter dated November 6, 1985, the Journal provided the requested information. Pet. App. 25.

On November 25, in a telephone conversation, Cooper's request to buy space to advertise his planned offer to purchase 4.999% of RCA, GE, and twenty-six other companies, was rejected by Cummings and the *Journal*. *See* Pet. App. 23-29. On December 5, 1985, also in a telephone conversation, Moran con-

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[2] $66.17 x 4,484,103 $296,713,895.51. Pet. App. 26-27.

[3] On the same date, November 21, 1985, Cooper made proposals of offers to purchase twenty-seven other companies, including GE. As with the RCA proposal, donation of stock equity was the only financing proposed. *See* Pet. App. 33, 38.

firmed the *Journal's* decision not to sell Cooper advertising space. This was later confirmed by letter. *See* Pet. App. 23, 25.

Dow Jones explained to Cooper that without substantially more supporting information about the planned offers of purchase, the *Journal* would not carry his advertisement. As submitted, the proposed advertisement was so vague and misleading that it was not publishable under the *Journal's* standards. Cooper concedes that he alone was denied the opportunity to purchase advertising space from the *Journal*. *See* Pet. App. 25.

On December 4, 1985, Cooper "began to dig" for evidence that the *Journal*, in conjunction with others, had agreed to never sell him the advertising space he desired." Pet. App. 25. The only evidence he located to support his suspicion arose out of an alleged conversation with an unnamed corporate executive. This unknown executive merely acknowledged Cooper's assertion that the *Journal* would not sell him space.[4] Cooper did not question the executive further. Cooper Affidavit, ¶ 26. Cooper presented no other evidence of an agreement between Dow Jones and any other party to refuse to sell him advertising space.

On February 13, 1986, following negotiations between the two companies, the RCA stockholders ac-

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[4] Cooper describes the conversation as follows: "By happenstance, the way the plaintiff [Cooper] raised the subject caused him to appear to be asking the executive if he was aware that 'I've had problems publishing the offer in the *Wall Street Journal*.' . . . [T]he executive immediately responded, 'yes'. . . ." Cooper Affidavit, ¶ 26.

cepted a merger with GE valued at $6.3 billion. The merger was later fully consummated.

Reasons for Denying a Writ of Mandamus or, Alternatively, Prohibition

Petitioner has not established any basis for this Court to issue either a writ of mandamus or a writ of prohibition. Extraordinary writs, such as mandamus and prohibition, are properly directed against a federal court that has either failed to perform a clear obligation, or exceeded its jurisdiction. *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-353 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). Here, the actions of the Court of Appeals for the District of Columbia Circuit, both procedurally and substantively, were well within the court's authority and jurisdiction.

A. Extraordinary Writs

The All Writs Act, 28 U.S.C. § 1651 (West 1966) provides that extraordinary writs may issue as "necessary or appropriate in aid of their (courts created by Act of Congress) respective jurisdictions." As such, it is a "drastic remedy" and is only available in "extraordinary situations." *Allied Chemical*, 449 U.S. at 34.

Generally, in order to avoid piecemeal appellate litigation and promote judicial efficiency, mandamus has only been available, in connection with federal courts, in order "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26

(1943) quoted with approval at *Will*, 389 U.S. at 95 and *Allied Chemical*, 449 U.S. at 35. For similar reasons, the availability of writs of prohibition has also been restricted. *United States v. Taylor*, 798 F.2d 1337, 1340-1341 (10th Cir. 1986) *reh'g denied; Matter of Bankers Trust Co.*, 775 F.2d 545 (3rd Cir. 1985).

In order to obtain a writ of mandamus or prohibition, in connection with a federal court, the applicant must meet a two-part standard. First, the applicant must demonstrate that he lacks any "other means to obtain the relief he desires." *Allied Chemical*, 449 U.S. at 35. Second, the applicant must prove "[his] right to issuance of the writ is clear and undisputable." *Allied Chemical*, 449 U.S. at 35 quoting from *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) quoting from *United States v. Duell*, 172 U.S. 576, 582 (1899).

Here, neither standard has been met. First, Cooper had an alternate means of relief available—petition for certiorari. 28 U.S.C. § 1254.[5] Second, Cooper has not established a 'clear and indisputable' right to have a writ issue. In summarily affirming the judgment of the District Court, the Court of Appeals did not exceed its jurisdiction or authority, either procedurally or substantively.

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[5] This Court may, in its descretion, treat Cooper's application for an extraordinary writ as a petition for certiorari. *Collier v. United States*, 382 U.S. 890 (1969). As discussed *infra*, the issues present in this case do not merit review on a petition of certiorari.

B. The Court of Appeals Had the Power to Hold Summary Proceedings on Cooper's Appeal

Cooper contends, wrongly, that the Court of Appeals exceeded its authority in summarily affirming, following an order to show cause. *See* Petition 24-25, 59. 28 U.S.C. §§ 1291, 2106, and Federal Rule Appellate Procedure 2, provide the authority for the procedure utilized in the instant action.

28 U.S.C. §§ 1291 and 2106 grant federal appellate courts the authority to resolve appeals from final orders rendered by the lower courts. In part, it permits the appellate courts to affirm lower court decisions on any grounds supported by the record, not merely those relied upon by the lower court. *Jaffke v. Dunham*, 352 U.S. 280 (1957). Where the facts and legal issues have been fully presented, a federal appellate court may also dispose of appeals, summarily.[6]

In addition to having the authority to dispose of appeals summarily, appellate courts have the power to tailor the proceedings in a particular case to the

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[6] *See e.g. Glick v. Koenig*, 766 F.2d 265 (7th Cir. 1985) (Appeal could be decided without oral argument where the matter is frivolous, the dispositive issue has been recently authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and record); *Martin-Trigona v. Smith*, 712 F.2d 1421, *on remand* 600 F. Supp. 1184 and 600 F. Supp. 1193, *affirmed* 818 F.2d 95 (D.C. Cir. 1987) (summarily dismissing appeal after careful review of the facts and the legal issues); *Barnes v. United States*, 678 F.2d 10 (3rd Cir. 1982) (holding "[t]here can be no dispute about our power to act summarily. Summary disposition by appellate courts, while not routine, is certainly not uncommon.")

facts and issues presented. Federal Rule of Appellate Procedure 2 provides that "[i]n the interest of expediting decision, or for other good cause shown, a court of appeals may . . . suspend the requirements or provision of any of these rules in a particular case . . . on its own motion and may order proceedings in accordance with its direction." Thus, the Court of Appeals for the District of Columbia Circuit had the power and the authority to dispense with the usual appeal process, issue a show cause order and hold summary proceedings.

Further, the Court of Appeals carefully considered the facts and the legal issues before issuing its decision. *Glick*, 766 F.2d at 265; *Barnes* 678 F.2d at 10. All parties were permitted to submit written responses to the order to show cause. Cooper and Dow Jones took the opportunity to submit lengthy memoranda with attachments. Finally, the Court of Appeals issued a written memorandum setting forth the issues on appeal, and, although it affirmed the District Court's judgments, it used a different rationale. Thus, the Court of Appeals gave this appeal due consideration and did not commit any procedural impropriety.

C. The Court of Appeals Correctly Affirmed the Judgment of the District Court

Rule 12(b)(6) provides for dismissal of actions which do not state a cause of action upon which the federal courts are empowered to provide a remedy. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This is just such an action.

Viewing the well-pleaded facts in the light most favorable to Cooper, the complaint and supporting

documents do not, as a matter of law, state a cause of action. Here, Cooper has alleged that Dow Jones committed violations of Section 14(e) of the 1934 Act 15 U.S.C. § 78n(e) (West 1981), Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (West 1973), and Section 1 of the Sherman Act, 15 U.S.C. § 1 (West Supp. 1987). As to each action, the complaint and Cooper affidavit fail to state a claim against Dow Jones, as a matter of law.

1. The Complaint Fails to State a Cause of Action Under the Antifraud Provisions of the Williams Act

In Counts I, II and III of the complaint, Cooper has alleged that Dow Jones violated the antifraud provisions of the 1934 Act, 15 U.S.C. § 78n(e) (West 1984). This provision is a general proscription against fraud in connection with tender offers. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-23 (1977). It is intended to protect shareholders in target companies by insuring that they have access to all material information before deciding whether to tender shares.

Here, no material information concerning a competing tender offer was withheld by Dow Jones since Cooper's offer of purchase was not a tender offer.[7] The term tender offer has not been defined by either Congress or this Court; however, the lower courts have developed two tests for determining whether a purchase offer is a tender offer.

The most widely accepted standard was first applied in *Wellman v. Dickinson*, 475 F. Supp. 783

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[7] Cooper lacks standing to bring a 1934 Act claim for damages, since he is at best only a disappointed offeror. Disappointed offerors do not have standing to bring claims for damages under Section 14(e). *Piper*, 430 U.S. at 35.

(S.D.N.Y. 1979) and holds that a tender offer is present whenever there is a public announcement of the offer and

> (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares . . .; (6) offer open only a limited period of time; (7) offeree subject to pressuring to sell his stock.

Wellman, 475 F. Supp. at 823-24. *See SEC v. Carter Hawley Stores*, 760 F.2d 945, 952, 952 n.5 (9th Cir. 1985). *See also Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (2d Cir. 1985). The second test, first applied in *S-G Securities Inc. v. Fuqua Investment Co.*, 466 F. Supp. 1114, 1126-1127 (D. Mass. 1987), finds a tender offer where a public announcement of a firm intention to purchase a large block of an issuer's shares is followed by rapid accumulation of shares by the offeror.

Both the *Wellman* and the *S-G Securities* tests recognize that one requirement of a tender offer is an express offer to purchase securities. Cooper's offer fails both tests as he never made a firm offer, rather he only articulated "plans" for "offers"[8] Pet. App.16, 47.

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[8] Indeed, Cooper has never indicated that he even attempted to purchase a single share of RCA stock. Application of the

2. The Complaint Fails to State a Cause of Action Under the Robinson-Patman Act

In Court IV of the complaint, Cooper charges that Dow Jones violated the Robinson-Patman Act, 15 U.S.C. § 13(e) (West 1973). There are four jurisdictional requirements in a Robinson-Patman Act claim: (1) two or more sales, (2) of commodities, (3) of "like grade and quality", (4) in commerce.[9] Here, two of these requirements are absent—this is a simple case of a seller declining to transact business with a single prospective buyer, not discrimination in price in two or more sales. Moreover, newspaper advertising is not a commodity.

Since the Robinson-Patman Act is intended to preclude price discrimination between two purchasers, and does not prevent a seller from choosing his customers, there is a jurisdictional requirement that the

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remaining elements of the *Wellman* test to Cooper's offer provides additional support for the conclusion that there was no tender offer. Cooper sought donations of less than 5% and would accept up to 80% of the shares of twenty-eight major corporations. He had no publicity or financing, offered no premium over the market price since he wanted the equity as a donation, and placed no meaningful time limit or other controls on his offer. Assuming *arguendo* Cooper made a tender offer that was material, the 1934 Act imposes no duty of publication on a newspaper, and the Dow Jones appellees were thus under no direct duty to publish the information at issue. Further, there was no implied duty to publish as a statute compelling a newspaper to publish that which it would not otherwise choose to print would be unconstitutional. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[9] F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 36, 45-83 (1962)

plaintiff show actual discriminatory sales.[10] Here, the only facts alleged in the complaint establish a single decision not to sell to Cooper. Cooper has not pleaded price discrimination on two or more sales. Dow Jones simply chose not to sell space to Cooper, unless he, first, provided additional information about his program.

The Robinson-Patman Act applies only to commodities. Newspaper advertising is not a commodity under the act.[11] This view has prevailed in the District of Columbia circuit and generally in other courts that have addressed the issue.[12]

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[10] *See Bruce's Juices v. American Can Co.*, 330 U.S. 743, 755 (1947); *Bird and Son, Inc.*, 25 FTC 468, 470 (1937) ("[s]ection 2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell"); *H.A.B. Chemical Co. Inc. v. Eastman Kodak Co.*, 1981-1 Trade Cases CCH ¶ 63,912 at 75, 748 (C.D. Cal. 1980) ("refusals to deal are not actionable as discrimination under the Robinson-Patman Act"); Patman, *Complete Guide to the Robinson-Patman Act*, 83 (1963).

[11] 79 Cong. Rec. 9078-9079 (1935) (Rep. Patman reconfirmed his view that the act was not intended to apply to "magazine or other advertising space"); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 n.27 (1953) (while reserving judgment, noting the government had conceded in oral argument that the Robinson-Patman Act did not apply to advertising space). *See*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 60-61 (1962).

[12] *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 86 (D.D.C. 1977), *aff'd.* 595 F.2d 888 (D.C. Cir. 1979) ("newspaper advertising is not a 'commodity' within the meaning of the Robinson-Patman Act"). *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 609 (2nd Cir. 1979) *cert. dismissed*, 448 U.S. 914 (1980) (to regard newspaper advertising as a commodity under the Robinson-Patman Act would be "contrary to

3. The Complaint Fails to State a Claim Under the Sherman Act

In Count IV of the complaint, Cooper has alleged that Dow Jones violated Section 1 of the Sherman Act. Cooper charges the Dow Jones respondents with conspiring among themselves with another unnamed Dow Jones employee in refusing to sell him advertising space, and second, charges that Dow Jones, together with the RCA and GE respondents, conspired to restrain trade in RCA stock. Pet. App. 33-34.

Cooper alleges that Dow Jones engaged in a unilateral refusal to deal. The Sherman Act does not reach a unilateral act of restraint of trade or refusal to deal involving a single firm.[13]

Cooper's claim of a conspiracy to impede transactions in RCA stock is similarly insufficient. The Sherman Act is intended to protect commerce by prohibiting actions that restrain trade. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983). Thus, a judicially recognizable action for recovery for

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the ordinary reading of the language, [was] disavowed on the floor of the Senate, disclaimed by the statute's principal author two years after its passage, . . . and [would be] contrary to the consistent course of judicial decision on this and related matters . . . .") *Diamond v. World News Corp.*, 542 F. Supp. 887, 889 (S.D.N.Y. 1980).

[13] *Copperweld Corp. v. Independence Tube Corp.*, 476 U.S. 752, 768-769 (1984) ("[c]oordinated conduct among officers and employees of the same company" and the internally coordinated conduct of a corporation does not violate Section 1 of the Sherman Act); *Diamond*, 542 F. Supp. at 889 ("a unilateral refusal to deal, for any reason, is not actionable under Section 1.")

a conspiracy for violating the Sherman Act must include a claim that the plaintiff has suffered damages arising out of a restraint of trade. *Id.*

Here, the alleged antitrust conspiracy focuses on Dow Jones' refusal to publish an advertisement. Pet. App. 34. This refusal to publish is not alleged to have adversely impacted Cooper's ability to purchase RCA stock. *Id.* Accordingly, Cooper has failed to allege a necessary element in an action for a conspiracy to violate the Sherman Act. Thus, the Court of Appeals properly affirmed dismissal of this count pursuant to Rule 12(b)(6).

Conclusion

Cooper's application for a writ of mandamus, or, in the alternative, a writ of prohibition, should be denied. He has failed to establish that an extraordinary writ was the only available remedy or to show clear entitlement to the writ.

The Court of Appeals did not exceed it's jurisdiction or authority in disposing of this matter upon an order to show cause. Further, the court properly affirmed the judgment of the District Court, based on grounds supported by the record.[14] This application should be denied.

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[14] Pursuant to Supreme Court Rule 17.1 this case is not appropriate for review on certiorari. As evidenced by the Court of Appeals Memorandum of October 9, 1987, the issues presented in the instant action and the pending petition for an extraordinary writ may be resolved by the application of well settled principles of law and procedure.

Respectfully submitted

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